ETHICS—WHAT WOULD YOU DO?

A PRACTICAL EXERCISE IN APPELLATE ETHICS

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Ethics—What Would You Do? A Practical Exercise in Appellate Ethics

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I. INTRODUCTION
Appeals seem to follow trial court judgments just as surely as night follows day. Indeed, many lawyers specialize in appellate practice. Lawyers’ compliance with rules of professional conduct obviously is as important in appellate litigation as it is in matters before a trial court or any other tribunal. Given the nature of appellate practice and its inherent differences from trial practice or the representation of clients in transactional or other non-litigation contexts, however, there are a variety of ethics rules that simply do not apply to representations of clients before appellate courts. There being no jury, no witness examinations, and no discovery in appellate representations, for example, rules concerning pretrial procedure and conduct in discovery, conduct at trial, and limits on a lawyer’s ability to act as advocate at trial when lawyer is also a witness simply do not apply to the normal life of an appellate lawyer. A number of other rules or professional conduct, such as those regarding a lawyer’s service as a third-party neutral, limiting lawyers’ ability to communicate with jurors after discharge, and establishing the duties of lawyers involved as advocates in non-adjudicative proceedings, are also not likely to surface in appellate representations.

While some professional responsibility issues will seldom, if ever, confront an appellate lawyer, a number of professional responsibility issues do tend to either arise more frequently, or be of weightier concern, in appellate litigation. Part II of this Chapter addresses a number of ethics issues relating to lawyers’ duty of candor to appellate courts and others. Part III explores the limits of appellate lawyers’ ability to criticize courts and judges. Although lawyers do not necessarily check their First Amendment rights at the courthouse door, those rights are notably scaled back in most jurisdictions. Part IV focuses on the pursuit of frivolous appeals and bad faith litigation at the appellate stage. Part V examines lawyers’ duties to avoid delay and to
expedite litigation in the context of appellate proceedings. Part VI discusses a conflict of interest issue—so-called positional conflicts—that, while rare, can be difficult to recognize and resolve.

II. APPELLATE LAWYERS AND THE TRUTH

“Truth is the cornerstone of the judicial system; a license to practice law requires allegiance and fidelity to truth.”1 For appellate lawyers, allegiance and fidelity to truth can be made more difficult when the core premise of their mission for their client may simply be untrue—the lower court decision that they are seeking to have reversed as erroneous may clearly have been correct. Or, when representing an appellee, an appellate lawyer may desperately wish to cling to a trial court victory that should have properly gone the other way. Unhappily for appellate lawyers, their duty of “allegiance and fidelity to truth” may, on the right facts, compel them to confess error below, notwithstanding their concurrent duty to competently advocate their clients’ claims.2 This explains, for example, the general requirement that appellate lawyers call to a court’s attention any uncertainties about the existence of appellate jurisdiction.3

This broad and overriding duty to be truthful, often described as a duty of candor, is critical. As the court in United States v. Shaffer Equipment Co.4 explained:

Our adversary system for the resolution of disputes rests on the unshakable foundation that truth is the object of the system’s process which is designed for the purpose of dispensing justice. However, because no one has an exclusive insight into truth, the process depends on the adversarial presentation of evidence, precedent and custom, and argument to reasoned conclusions—all directed with unwavering effort to what, in good faith, is believed to be true on matters material to the disposition. Even the slightest accommodation of deceit or lack of candor in any material respect

1 Office of Disciplinary Counsel v. Kiesewetter, 889 A.2d 47, 56 (Pa. 2005); see also In re Kalil’s Case, 773 A.2d 647, 648 (N.H. 2001) (“The confidence of judges to rely with certainty upon the word of attorneys forms ‘the very bedrock’ of our judicial system.”).
4 11 F.3d 450 (4th Cir. 1993)
quickly erodes the validity of the process. As soon as the process falters in that respect, the people are then justified in abandoning support for the system in favor of one where honesty is preeminent.5

Indeed, courts can and do treat this duty of candor owed by lawyers as officers of the court as being both broader than that imposed by any ethics rules and a duty which ethics rules do not supplant.6 This broader, general duty of candor derives from lawyers’ larger duty to protect the integrity of the judicial process and can provide a basis for sanctioning a lawyer even if the lawyer’s dishonesty arguably does not amount to a violation of pertinent ethics rules, such as Model Rule 3.3,7 which generally establishes lawyers’ duty of candor to tribunals.8 In addition to Model Rule 3.3, acts of dishonesty in handling appeals can result in a determination that a lawyer violated Model Rule 8.4(c), which prohibits “conduct involving dishonesty, fraud, deceit or misrepresentation,” or Model Rule 8.4(d), which prohibits conduct that is “prejudicial to the administration of justice,” or both.9

Model Rule 3.3, straightforwardly entitled “Candor Toward the Tribunal,” contains two provisions of vital importance to lawyers handling cases on appeal. The first is the prohibition in Model Rule 3.3(a)(1) against knowingly making “a false statement of fact or law to a tribunal.”10 The second is the prohibition in Model Rule 3.3(a)(2) against knowingly failing “to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel.”11 Because Model

5 Id. at 457.
6 Id. at 458.
7 Id. at 458-63.
8 MODEL RULES OF PROF’L CONDUCT R. 3.3(2011).
9 Id. R. 8.4(c) & (d).
10 Id. R. 3.3(a)(1).
11 Id. R. 3.3(a)(2).
Rule 3.3(c) explicitly provides that a lawyer’s duties under Model Rule 3.3 trump any obligation of client confidentiality,¹² these two candor-based duties under the ethics rules can require an appellate lawyer to disclose information despite the fact that it is confidential client information. Working through the duty to disclose adverse authority and its impact on marshaling arguments for the client can be particularly challenging for appellate lawyers.

A. The Duty to Disclose Adverse Authority

One of an attorney’s “basic duties” as an officer of the court is to call applicable legal authority to the court’s attention.¹³ Ethics rules require a lawyer to not knowingly “fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel.”¹⁴ Phrased positively, a lawyer is ethically obligated to disclose the described authority. “Legal authority,” for purposes of this rule, is not limited merely to case law and statutory authority, but extends to administrative rulings, ordinances, rules, and regulations.¹⁵ Sources commonly described by lawyers as “secondary authorities,” such as law review and bar journal articles, treatises, legal encyclopedias, hornbooks and similar sources, however, do not qualify as legal authority for purposes of this rule.

Model Rule 3.3(a)(2) speaks in terms of disclosing legal authority in the “controlling jurisdiction,” which means that this duty to reveal directly adverse case law is not limited to

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¹² Id. R. 3.3(c) (explaining that lawyers’ duties under Rule 3.3(a) “apply even if compliance requires disclosure of information otherwise protected by Rule 1.6”).

¹³ Dike v. People, 30 P.3d 197, 201 (Colo. 2001)


¹⁵ See, e.g., Dilallo v. Riding Safely, Inc., 687 So. 2d 353, 355 (Fla. Dist. Ct. App. 1997) (holding that defense lawyer in horseback riding accident lawsuit had duty to disclose that statute immunizing defendant from liability had post-accident effective date).
appellate decisions, but can extend even to trial court decisions.\textsuperscript{16} The “controlling jurisdiction,” for purposes of this rule, typically means the forum state in cases pending before state courts and the same judicial district or appellate circuit for federal court cases.\textsuperscript{17} Of course, whether you are in state court or federal court, decisions of the United States Supreme Court are always considered to be from a controlling jurisdiction.\textsuperscript{18}

One interesting phenomenon is how prone lawyers can be to simply misconstrue the ethics requirement to disclose directly adverse authority to require only the disclosure of controlling authority.\textsuperscript{19} From time-to-time, attorneys try to mount creative arguments about whether a case is from a controlling jurisdiction or not, but more often than not those arguments merely involve a variation on the mistaken concept that the test is whether the case amounts to controlling authority. \textit{Schutts v. Bentley Nevada Corp.}\textsuperscript{20} is one such instance. In \textit{Schutts}, the plaintiff’s lawyer was taken to task by the Nevada district court for failing to cite two Ninth Circuit decisions that were directly adverse to the plaintiff’s position in the litigation. The

\textsuperscript{16} Douglass v. Delta Air Lines, Inc., 897 F.2d 1336, 1344 (5th Cir. 1990); Smith v. Scripto-Tokai Corp., 170 F. Supp. 2d 533, 538-40 (W.D. pa. 2001). \textit{But see} Brundage v. Estate of Carambio, 951 A.2d 947 (N.J. 2008) (“Both because the Levine decision was unpublished, and because it was the decision of a trial court, it was not ‘legal authority in the controlling jurisdiction’ that Collins was obligated to call to the attention of either the Family Part judge or the appellate panel.”).


\textsuperscript{18} Batko v. Sayreville Democratic Org., 860 A.2d 967, 968 (N.J. Super. Ct. App. Div. 2004) (“There is no more important or dispositive source of legal authority than decisions of the Supreme Court of the United States.”); State v. Somerlot, 544 S.E.2d 52, 54 n.2 (W. Va. 2000) (criticizing lawyers who omitted any discussion of Supreme Court decision that clearly controlled an important issue in the case and had actually been relied upon by lower court).

\textsuperscript{19} \textit{See, e.g.}, Tyler v. State, 47 P.3d 1095, 1104 (Alaska Ct. App. 2001).

\textsuperscript{20} 966 F. Supp. 1549 (D. Nev. 1997)
lawyer sought to justify his omission on the basis that there was a conflicting decision in the Second Circuit and that one of the Ninth Circuit cases was “not the law of the land” until the Supreme Court acted to reconcile the Ninth Circuit and Second Circuit decisions. The Nevada district court labeled the lawyer’s argument as “truly bizarre”\(^2\){21} and dispatched it fairly simply. Because the cases were decisions by the federal court of appeals encompassing Nevada, “they [were] the law, here, in this court. End of story.”\(^{22}\)

What if there is no authority on point in the controlling jurisdiction, but there is directly adverse authority in another jurisdiction? Must a lawyer who knows of such authority cite it even though it is not in the controlling jurisdiction? Model Rule 3.3(a)(2) itself does not require disclosure in this situation, and disclosure of such authority could very well undermine an advocate’s duty to competently represent her client. If, on the other hand, a lawyer cites authority from outside the controlling jurisdiction because there is no authority on point in the jurisdiction, some courts reason that the lawyer then becomes required to also reveal directly adverse authority from outside the controlling jurisdiction.\(^2\){23} Courts advocating such an obligation posit that Rule 3.3(a)(2) only establishes a minimum standard of conduct; a lawyer’s general duty of candor can require more.\(^4\){24} Moreover, a lawyer’s selective citation of authorities from other jurisdictions arguably represents an attempt to deceive the court,\(^5\){25} thus implicating

\(^{21}\) *Id.* at 1563.

\(^{22}\) *Id.*

\(^{23}\) *See* Mannheim Video, Inc. v. County of Cook, 884 F.2d 1043, 1047 (7th Cir. 1989); Plant v. Doe, 19 F. Supp. 2d 1316, 1318-19 (S.D. Fla. 1998); Rural Water Sys. #1 v. City of Sioux Ctr., 967 F. Supp. 1483, 1498 n.2 (N.D. Iowa 1997).

\(^{24}\) *See, e.g., Rural Water*, 967 F. Supp. at 1498 n.2 (stating that “basic notions of professionalism” demand something more than mere compliance with ethics rules regarding the disclosure of directly adverse authority in the controlling jurisdiction in situations such as this).

\(^{25}\) *See Mannheim Video*, 884 F.2d at 1047 (calling the selective citation of such authorities “a poor example of an attorney conforming to his duties as an officer of the court”); *Rural Water*, 967 F. Supp. at 1498 n.2 (saying that the selective citation of authorities from outside the controlling jurisdiction “smacks of concealment”).
Rules 8.4(c) and (d). One could further argue, perhaps analogizing to tort law, that a lawyer may be held to assume a duty to reveal directly adverse authority from outside the controlling jurisdiction if she cites favorable authority from outside the jurisdiction.

It may be possible for a lawyer to assume a duty to reveal directly adverse authority from outside the controlling jurisdiction, but courts should recognize such a duty sparingly. Even a lawyer’s rigorous duty of candor as an officer of the court must have reasonable limits to accommodate the lawyer’s duties to her client as an advocate. For example, it is one thing for a court to take a lawyer to task for cherry-picking a case from a non-controlling jurisdiction and ignoring another case in another non-controlling jurisdiction that is directly adverse to the lawyer’s client’s position. It is another, however, for a court to hold that because a lawyer cited a case from non-controlling jurisdiction A that adopted her client’s argument, it would be a breach of the lawyer’s duty of candor to not disclose the existence of a case from non-controlling jurisdiction B that rejected the client’s argument. Further, in the rare instance when such a duty is imposed, it should not be premised in any respect upon Model Rule 3.3(a)(2), for the language of that rule in no way supports it. Depending on the facts, Model Rules 8.4(c) and (d) are better authorities on which to claim a premise for such a duty.

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26 Model Rules of Prof’l Conduct R. 8.4(c) (2011) (prohibiting “conduct involving dishonesty, fraud, deceit or misrepresentation”); id. R. 8.4(d) (stating that it is professional misconduct for a lawyer to “engage in conduct that is prejudicial to the administration of justice”).

27 See Mannheim Video, 884 F.2d at 1047 (describing lawyer’s failure to reveal non-dispositional authority from intermediate state appellate court as “an exercise in gall” when he had cited intermediate appellate court decisions from other states to support his position, in addition to citing federal district court decisions from outside the Seventh Circuit, but declining to reverse district judge’s decision not to impose sanctions.).

28 See In re Uchendu, 812 A.2d 933, 940-41 (D.C. 2002) (noting the breadth of Rule 8.4(d) and explaining that a lawyer’s conduct may violate Rule 8.4(d) even if it does not actually affect a court’s decision-making process, but merely has the potential to do so).
Under Model Rule 3.3(a)(2), the lawyer’s ethical duty to reveal authority is not triggered unless the authority is known to be “directly adverse” to her client’s position. Nevertheless, lawyers who split hairs over whether adverse authority is something they know to be “directly” adverse dance on a razor’s edge, inasmuch as that determination is almost always subject to objective evaluation rather than pivoting on the subjective view of the attorney involved. Lawyers should recognize that, for purposes of their ethical obligation, authority may be “directly adverse” even though the lawyer reasonably believes that the authority is factually distinguishable or that the court will otherwise be led to determine that the authority is inapposite.

An example of a “doomed to fail” type of argument involves claiming that a case is not directly adverse because it has been rendered questionable or “stale” because of the passage of time. While the passage of many years without any mention in the case law can provide a basis for seeking to distinguish authority and even seeking to have a modern court question its vitality, it does not offer an excuse for failing to disclose the existence of the authority. The mere passage of time alone cannot transform directly adverse authority into something else any more than an alchemist can transform lead into gold.

From a practical perspective, Model Rule 3.3(a)(2) should seldom have to concern good advocates. As advocates, our credibility is an essential commodity in all our dealings, but even more significantly so with respect to the courts in which we practice. Failing to reveal authority

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31 See Lieber v. ITT Hartford Ins. Ctr., Inc., 15 P.3d 1030, 1039 n. 14 (Utah 2000) (rejecting argument that “simply because a case has not been cited recently, it has no precedential value. It does not matter when a case was decided; as long as it has not been overruled, it is still the law and binding precedent. . .”).
that the lawyer realizes the court is likely to view as important or advocating a position contrary to directly adverse authority that was not disclosed are obvious ways to leave a court feeling misled and erode judicial trust. In fact, judges, like everyone else, are commonly inclined to ascribe greater importance to items that people seek to hide from them; thus, a lawyer’s failure to reveal directly adverse authority can actually serve to enhance the status of the authority from the court’s viewpoint—after all, if the authority was so obviously wrong or readily distinguishable, surely the lawyer would have taken the opportunity to so argue. For these reasons, the best appellate advocates do not shy away from revealing directly adverse authority in the controlling jurisdiction, but rather reveal its existence while simultaneously offering up their best arguments to criticize, distinguish, or downplay the authority’s importance or, if unable to do anything else, candidly seek its reversal outright.\(^{32}\) An added benefit of doing so is that such behavior builds credibility with the court and may even favorably influence the court’s ultimate decision.\(^{33}\)

A particularly telling example of how ineffective taking the opposite sort of approach to dealing with directly adverse authority can be is *Tyler v. State*.\(^{34}\) After being convicted of a felony for driving while intoxicated, David Tyler appealed his conviction to challenge how the court treated his two prior DWI offenses because they affected his status as a repeat offender and meant a felony conviction this time instead of a misdemeanor.\(^{35}\) Because it was not cited by the prosecutor nor by Tyler’s own attorney, Eugene Cyrus, the existence of an Alaska Supreme Court case, *McGhee v. State*,\(^{36}\) which “addressed this very issue in a slightly different setting”

\(^{32}\) See, e.g., Williams v. State, 74 S.W.3d 902, 905 (Tex. App. 2002) (“Showing high ethical standards, appellant’s counsel on appeal acknowledges the existence of controlling case authority directly contrary to his arguments.”)


\(^{34}\) 47 P.3d 1095 (Alaska Ct. App. 2001).

\(^{35}\) Id. at 1097-99.

\(^{36}\) 951 P.2d 1215 (Alaska 1998).
only came to the appellate court’s attention as a result of its own research.\textsuperscript{37} Cyrus could not claim, however, that he was unaware of \textit{McGhee}, because Cyrus was the lawyer who represented McGhee before the Alaska Supreme Court.\textsuperscript{38}

Cyrus explained that he had not cited \textit{McGhee} because he believed that it did not control the outcome of Tyler’s case.\textsuperscript{39} He contended that \textit{McGhee} was factually distinguishable, and that the court was wrong to rely on \textit{McGhee} to find against Tyler because the cases arose in different contexts.\textsuperscript{40} Among other things, Cyrus looked for assistance from a trial court order in another case in which the judge had agreed that \textit{McGhee} did not control the disposition of a case like Tyler’s. Thus, because “reasonable attorneys and judges could disagree on . . . whether \textit{McGhee} was controlling authority in Tyler’s case,” Rule 3.3 did not require him to reveal it.\textsuperscript{41}

The court easily rejected Cyrus’ arguments. \textit{McGhee}, having been decided by the Alaska Supreme Court, was clearly authority in the controlling jurisdiction and, as the court explained Tyler’s duty of disclosure extended to directly adverse authority in the “controlling jurisdiction,” not just “controlling authority.”\textsuperscript{42} With respect to whether \textit{McGhee} should be considered “directly adverse,” the court stated:

\begin{quote}
[A] court decision can be “directly adverse” to a lawyer’s position even though the lawyer reasonably believes that the decision is factually distinguishable from the current case or the lawyer reasonably believes that, for some other reason, the court will
\end{quote}

\textsuperscript{37} \textit{Tyler}, 47 P.3d at 1099.
\textsuperscript{38} \textit{Id.} at 1102.
\textsuperscript{39} \textit{Id.}
\textsuperscript{40} \textit{Id.} at 1102-03. The making of this type of doomed argument, especially by attorneys who were involved in the prior case, is surprisingly commonplace. \textit{See, e.g.}, \textit{In re Thonert}, 733 N.E.2d 932, 933-34 (Ind. 2000) (reprimanding and admonishing lawyer for failing to disclose in appellate brief controlling authority).
\textsuperscript{41} \textit{Tyler}, 47 P.3d at 1104.
\textsuperscript{42} \textit{Id.}
ultimately conclude that the decision does not control the current case.43

The court explained that such a determination is not made in hindsight; rather, it turns on whether the attorney knows, at the time the attorney makes the conscious decision not to cite the authority, that the omitted authority was directly adverse to the attorney’s position.44 Cyrus did not claim ignorance of McGhee’s potential importance to Tyler’s appeal. Rather, he contended instead that he honestly believed that it was factually distinguishable, should not have controlled the court’s decision, and, thus, he was not required to disclose it. Not surprisingly, the Tyler court again rejected this argument.45 Cyrus was obligated to call McGhee to the court’s attention even if he reasonably believed the case to be inapposite.46 The Tyler court concluded that Cyrus violated Rule 3.3, but because the court determined that he did not act in bad faith, it only fined him $250.47

Although Model Rule 3.3(a)(2) provides that the duty to reveal authority will not arise unless the authority is “not disclosed by opposing counsel,”48 this language does not arm a lawyer who knows of directly adverse authority in the controlling jurisdiction to omit that authority from an opening brief in the hope that her opponent will thereafter find and cite it.49 This is because of the lawyer’s duty “to refrain from affirmatively misleading [a] court as to the state of the law” and the unsurprising view of courts that a breach of that duty is not cured by

43 Id. at 1105-06.
44 Id. at 1107.
45 Id. (“When an attorney knows of a decision that is ‘directly adverse’ . . . , and when opposing counsel fails to cite that decision, Rule 3.3(a)(3) requires the attorney to reveal the decision even though one could reasonably argue that it does not control the case at hand.”).
46 Id. at 1108.
47 Id. at 1109.
49 Jorgenson v. County of Volusia, 846 F.2d 1350, 1352 (11th Cir. 1988).
subsequent citation of the authority in question by opposing counsel.\textsuperscript{50} Thus, from an ethical standpoint, this apparent safe harbor only opens for appellate lawyers when it is least useful—when they are second to file a brief and their adversary has already raised and argued the authority in the opening brief.

A final question worth raising is what must a lawyer do to be able to claim to have satisfied the obligation to “disclose” the directly adverse authority? Insight into the answer to this question can be gained by discussing a postscript to the \textit{Tyler} decision.\textsuperscript{51} There, despite finding that Cyrus violated Rule 3.3, the Alaska Court of Appeals fined him $250—a pittance. Remarkably, given that outcome, Cyrus petitioned the court for rehearing. He pointed out for the first time on rehearing that he actually \textit{did} cite \textit{McGhee} in his opening brief; however, he cited the case for an unrelated point of law.\textsuperscript{52} The court did not find this “interesting coincidence” to provide a basis for changing its original decision and denied his petition for rehearing.\textsuperscript{53}

From a practitioner’s perspective, the court’s conclusion on rehearing that Cyrus violated Rule 3.3 even though he actually had cited \textit{McGhee} in his opening brief, albeit on an unrelated point, may seem a surprising outcome. Many lawyers would consider mere citation to a directly adverse case to be “disclosure” for purposes of the rule. After all, an advocate is only obligated to disclose directly adverse authority; she is not required to engage in a “disinterested exposition

\textsuperscript{50} \textit{Id.} \textit{But see} RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 111 cmt. c. (2000) (“If opposing counsel will have an opportunity to assert the adverse authority, as in a reply memorandum or brief, but fails to do so, [the lawyer is required] to draw the tribunal’s attention to the omitted authority before the matter is submitted for decision.”).


\textsuperscript{52} \textit{Id.} at 1111.

\textsuperscript{53} \textit{Id.}
of the law.”54 Thus, citation should be treated as sufficient disclosure given that the court ought to be expected to read the case for itself once it is cited.

That line of thought, however, takes too crabbed a view of the purpose behind Model Rule 3.3(a)(2) and state analogs. The purpose behind the rule is to require that what is being disclosed to the court is the fact that directly adverse authority in the controlling jurisdiction exists. It is precisely such authority that may be important to the court in reaching a correct result. The fact that the citation to McGhee was made in relation to an unrelated point of law—a point of law for which it did not constitute directly adverse authority—means that Cyrus’ citation to McGhee in that manner did not satisfy the purpose of the rule and that the Tyler court reached the correct conclusion.

Had Cyrus simply added a footnote to his argument with a but see citation to McGhee with no further explanation, he would have been in the clear. A but see signal indicates that cited authority clearly supports a proposition contrary to the main proposition. A lawyer’s citation to directly adverse authority for a proposition different than that on which the authority is directly adverse, however, should not be deemed to satisfy the lawyer’s duty under Model Rule 3.3(a)(2). Courts rely on counsel to supply most legal argument, and it is unreasonable for a lawyer to claim to have complied with her ethical obligation through means that would require the court to scour every cited case for other issues or points that also happened to be relevant to the dispute at hand. Moreover, requiring courts to read all cases cited to them for purposes of ferreting out directly adverse authority delays the resolution of all disputes, increases the courts’ workloads, and leads to the unnecessary expenditure of judicial resources.55 As the Tyler court explained:

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54 MODEL RULES OF PROF’L CONDUCT R. 3.3 cmt. 4 (2011).

55 See Smith v. Scripto-Tokai Corp., 170 F. Supp. 2d 533, 539 (W.D. Pa. 2001) (stating that the disclosure of adverse authority “may save considerable time and effort in the court’s own analysis”); Tyler, 47 P.3d at 1108 (discussing the “unneeded expenditure of judicial resources” caused by lawyers’ failure to disclose directly adverse
When a lawyer practicing before us fails to disclose a decision . . . that is directly adverse to the lawyer’s position, the lawyer’s conduct will, at the very best, merely result in an unneeded expenditure of judicial resources – the time spent by judges or law clerks in tracking down the adverse authority. At worst, we will not find the adverse authority and we will issue a decision that fails to take account of it, leading to confusion in the law and possibly unfair outcomes for the litigants involved. This potential damage is compounded by the fact that our decision, if published, will be binding in future cases.\textsuperscript{56}

Of course, in \textit{Tyler}, the fact that Cyrus apparently overlooked until the eleventh hour when he petitioned for rehearing that he had actually cited \textit{McGhee} at all perhaps suggested to the court that Cyrus always knew that his citation to the case for an unrelated point did not provide a defense to his alleged Rule 3.3 violation.\textsuperscript{57} The fact that, even though Cyrus had cited the decision, the prosecuting attorney also failed to cite and argue \textit{McGhee} to support the State’s position, only means that there was plenty of poor advocacy to go around in \textit{Tyler}.

\textbf{B. False Statements of Material Fact or Law and Other Forms of Dishonesty}

Appellate lawyers can run afoul of their duty of candor through various types of conduct having as a common thread acts of dishonesty. Given how important written communication is to the appellate process, it will come as no surprise that many such instances involve dishonest conduct relating to, or revealed within, briefs. In \textit{Thomas v. City of North Las Vegas},\textsuperscript{58} for example, the court sanctioned a lawyer for materially misrepresenting facts, filling his brief with assertions that lacked citations to the record, and making arguments without case law support.\textsuperscript{59}

\begin{itemize}
  \item \textsuperscript{56} \textit{Tyler}, 47 P.3d at 1108 (footnote omitted).
  \item \textsuperscript{57} \textit{Id.} at 1111.
  \item \textsuperscript{58} 127 P.3d 1057 (Nev. 2006).
  \item \textsuperscript{59} \textit{Id.} at 1066-67; see also Sierra Glass & Mirror v. Viking Indus., Inc., 808 P.2d 512, 516-17 (Nev. 1991) (involving a false statement of material fact in an appellate brief); \textit{In re} Disciplinary Proceedings Against Kalal, 643 N.W.2d 466, 468-74 (Wis. 2002) (reprimanding lawyer who misrepresented facts during appellate oral argument).
\end{itemize}
Likewise, in *Schlafly v. Schlafly*, the court castigated the appellants’ lawyers for “blatant misrepresentation and mischaracterization of the facts” in briefs filed with the court and wrote at length to condemn their breach of the duty of candor and the hardships their unprofessional conduct caused others. Lawyers occasionally ghost write briefs for ostensibly pro se litigants, conduct which can be argued to amount to a misrepresentation to the court in which the brief is filed. Lawyers also will, far too frequently, engage in acts of plagiarism in violation not only of their ethical obligations but in dereliction of their duties of competence and diligence given that acknowledging that the ideas being brought forth are those of scholars or other recognized secondary authority will be far more persuasive than claiming them as your own.

Briefing also provides a fertile source of a number of additional types of unfortunate and unethical conduct for which lawyers can find themselves subject to professional discipline. In *Weeki Wachee Springs, LLC v. Southwest Florida Water Management*, the court sanctioned a lawyer for cheating on line-spacing and font size in his client’s brief in order to circumvent the court’s rules on page limits for briefs. The court succinctly rejected the lawyer’s “convoluted argument” as to why he had not violated the rules, an unremarkable outcome given that the court had previously caught the same lawyer using an impermissibly small font in his brief. Lawyers

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60 33 S.W.2d 863 (Tex. App. 2000).

61 *Id.* at 872-74; *see also* Myers v. Trendwest Resorts, Inc., 100 Cal. Rptr. 3d 658, 665 (Cal. Ct. App. 2009) (stating that “[p]rofessional ethics and considerations of credibility in advocacy require that appellants support their arguments with fair and accurate representations of trial court proceedings,” and lamenting the need to scour a voluminous record to discover evidence that a party should highlight); People v. Roose, 44 P.3d 266, 271 (Colo. 2002) (holding that lawyer who misrepresented facts in notice of appeal violated ethical rules, including Rule 3.3(a)(1)).


63 *See, e.g.*, Frith v. State, 325 N.E.2d 186, 188 (Ind. 1975) (noting that appellant copied ten ALR pages in brief “without quotation marks, indentation or citation” and without listing ALR in table of citations or in any other identification of authority in brief).


65 *Id.* at 595-56.
also can be found to have acted unethically by employing selective quotations of authority, including the misuse of ellipses to wrongly alter the meaning or import of authorities or documents in the record.66

Although not an appellate decision, Northwestern National Insurance Co. v. Guthrie67 illustrates this kind of troubling conduct. Northwestern National was an insurance coverage case. In arguing that the district court should reconsider its denial of their motion for judgment on the pleadings, counsel for the defendants recited in their memorandum the line of cases establishing the general rule in Illinois that an insurer’s duty to defend is to be determined by the allegations in the complaint against the insured. Defense counsel, however, neglected to discuss a critical exception to the general rule that permits the insurer to challenge the existence of any duty to defend by showing that the actions forming the basis of the suit against the insured fall within a policy exception.68 The court considered that failure to be “something more than mere oversight.”69 For example, the defense lawyers quoted a lengthy passage from a case setting forth the general rule, but “[t]he very next sentence explaining the exception to the rule in the declaratory judgment context, [was] not disclosed by counsel.”70 Nor did they find another space in their memorandum to make mention of the existence of the exception; this failure to disclose

66 See, e.g., Precision Specialty Metals, Inc. v. United States, 315 F.3d 1346, 1357 (Fed. Cir. 2003) (sanctioning lawyer who “in quoting from and citing published opinions, . . . distorted what the opinions stated by leaving out significant portions of the citations or cropping one of them, and failed to show that she and not the court has supplied the emphasis in one of them”); Amstar Corp. v. Envirotech Corp., 730 F.2d 1476, 1486 (Fed. Cir. 1984) (“Distortion of the record, by deletion of critical language in quoting from the record, reflects a lack of candor required by . . . Rule 3.3.”); Federated Mut. Ins. Co. v. Anderson, 920 P.2d 97, 103-04 (Mont. 1996) (sanctioning insurer that attempted to mislead court through alteration of case holding by use of ellipses); Sobol v. Capital Mgmt. Consultants, Inc., 726 P.2d 335, 337 (Nev. 1986) (quoting case as though quoted language was the court’s holding when, in fact, the quote came from the dissent); Comm. on Legal Ethics of the W. Va. State Bar v. Farber, 408 S.E.2d 274, 280-81 (W. Va. 1991) (suspending lawyer who, among other things, misrepresented paraphrasing as a block quotation).


68 Id. at *1.

69 Id. at *2.

70 Id.
relevant authority, the court observed, came “perilously close to a violation of the legal profession’s ethical canons.”71 The court, however, opted to assume that the failure to reveal the authority at issue was simply the result of the lawyers’ “sloppy research and writing” rather than a purposeful attempt to mislead the court.72 Instead of treating the matter as something requiring a disciplinary referral or a court sanction, the district court opted instead to direct the head of the litigation department at the firm employing defense counsel to write to the court in response to its concerns about the matter.73 Although this outcome likely annoyed the lawyer who was required to correspond with the court, it was a much more fortunate outcome than the lawyers involved had any right to expect.

While certainly a common source of problems, briefs are not the only medium in which appellate lawyers can engage in acts of dishonesty leading to discipline. In In re Kalal,74 the Wisconsin Supreme Court publicly reprimanded a lawyer who lied and also gave “knowingly misleading” answers to questions posed by the justices during oral argument.75 Misleading a court through omissions and silence about the fact that a case has actually settled, as occurred in Merkle v. Guardianship of Jacob,76 involves a lack of candor striking at the core of the court system.

In Merkle, a Florida lawyer who was hoping for a ruling to provide precedent for similar cases ended up being fined and sanctioned instead. While serving as a guardian, LeRoy Merkle paid himself nearly $4000 that the trial court ordered him to refund to the estate. He appealed

71 Id.
72 Id.
73 Id.
74 643 N.W.2d 466 (Wis. 2002).
75 Id. at 472-74.
that decision, acting as his own lawyer, and when no one appeared as an appellee, the appellate court reversed and remanded the case to the trial court.\footnote{Id. at 597.} Thereafter, the Department of Veterans Affairs filed a motion to vacate in the court of appeals revealing that, prior to the appellate court’s decision, Merkle and the Department had agreed that Merkle would refund the money to the estate and the Department would consent to Merkle being discharged as guardian.\footnote{Id. at 598.}

After being asked to respond by the appellate court, Merkle claimed that the agreement with the Department was conditioned on the fact it would not prevent appellate review of the trial court ruling. The appellate court referred the dispute to a commissioner for a hearing.\footnote{Id.} The hearing revealed that Merkle had actually filed his appellate brief the day after he executed the settlement agreement with the Department. During the hearing, Merkle asserted that the court had not been notified because of “greater issues besides this immediate case.”\footnote{Id. at 599.}

In addition to stressing that Merkle’s conduct violated his duty of candor to the court, the court noted that Merkle had clearly violated Florida Rule of Appellate Procedure 9.350(a), which explicitly requires the court to be “immediately notified” through a “signed stipulation for dismissal” when a case is settled before a decision on the merits.\footnote{Id.} Although willing to treat his admitted lack of appellate experience as justifying mitigation of discipline, the court of appeals determined that Merkle’s conduct warranted sanctions, including payment of a $500 fine, payment of the costs of the proceedings before the commissioner, and mandatory attendance at
an additional 15 hours of continuing legal education programming regarding appellate practice and procedure.  

*AIG Hawai`i Insurance Co. v. Bateman* is another illustrative case from the same mold as *Merkle*. *Bateman* stemmed from an earlier declaratory judgment action, *Vincente*. The parties in *Vincente*, including AIG, settled the declaratory judgment action. They did not reveal the settlement, however, and instead proceeded on appeal, because *Vincente* involved insurance coverage issues that AIG wanted resolved. Both AIG’s lawyers and Vincente’s lawyers briefed the case; neither side revealed the settlement, which, of course, rendered the appeal moot. After the Hawaii Supreme Court in *Vincente* issued an opinion favorable to AIG, and remanded the case to the trial court to enter summary judgment in AIG’s favor, AIG moved to rescind the parties’ settlement as having been premised on a mutual mistake of law. The trial court denied AIG’s recission motion and the *Bateman* appeal followed.

The *Bateman* court was unimpressed by AIG’s prosecution of an appeal that should have been moot to essentially obtain an advisory opinion. The court was most disturbed, however, by the conduct of AIG’s and Vincente’s lawyers in concealing the settlement so that the *Vincente* appeal could proceed. In discussing their conduct, the court observed that “[t]he failure to make disclosure of a material fact to a tribunal is the equivalent of affirmative misrepresentation.”

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82 *Id.* at 602.
85 *Bateman*, 923 P.2d at 397-98.
86 *Id.* at 398.
87 *Id.* at 400-01.
88 *Id.* at 402.
was clear that the parties’ settlement in *Vincente* was a material fact; had the lawyers revealed it, the appeal would have been moot. By not revealing the settlement, the lawyers duped the court into entering an opinion. Under the circumstances, the lawyers’ failure to reveal the settlement “was tantamount to affirmative misrepresentation.”89 The lawyers’ conduct thus appeared to violate Rules 3.3(a)(1) and 8.4(c), and the supreme court referred the matter to state disciplinary authorities for possible prosecution.

III. LAWYERS’ CRITICISM OF COURTS

Driven by both altruism and self-interest, lawyers generally are deferential to, and respectful of, courts. Nevertheless, litigation is an exceedingly competitive endeavor and advocates and their clients alike can be very disappointed when decisions go against them. Once a case has reached the appellate stage, opportunities to alter a disappointing outcome often begin to dwindle as a result of the standard of review or simply because the case is closer to reaching a truly final, non-appealable judgment. Unfortunately, advocates who find themselves on the wrong side of a ruling, and especially those who feel pressured by a disappointed client, may allow personal factors to lead them to improperly criticize the court believed to have wrongly decided a case and, in so doing, potentially violate their ethical obligations. In *Northern Security Insurance Co. v. Mitec Electronics, Ltd.* 90 for example, Mitec’s counsel derided the trial court’s reasoning and conclusions as “disingenuous,” “inane,” “ludicrous,” and “risible.”91 While the Vermont Supreme Court did not sanction the lawyers, it pointedly noted that Mitec’s briefs “lack

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89 *Id.*


91 *Id.* at 453 n.3.
the professional tone we expect from members of the bar,” and reminded the lawyers that the
tenor of their protestations could not create error where none existed.92

Appellate lawyers must think very carefully in fashioning their criticisms of lower court
decisions to ensure that they are not doing so in ways that are capable of being read as attacks on
the integrity or qualifications of the responsible judges. If it seems ridiculous to have to suggest
that lawyers generally should not attack the integrity or qualifications of courts or judges, the
many cases in which lawyers have been disciplined for allowing their zeal or disappointment to
overcome their good judgment amply demonstrate the need to call lawyers’ attention to their
duties under the ethics rules. 93 Model Rule 8.2(a) provides:

A lawyer shall not make a statement that the lawyer knows to be
false or with reckless disregard as to its truth or falsity concerning
the qualifications or integrity of a judge, adjudicatory officer or
public legal officer, or of a candidate for election or appointment to
judicial or legal office.94

In addition to potential exposure to discipline, a lawyer who falsely or recklessly remarks about
the qualifications or integrity of a court in a brief risks having her brief stricken in whole or
part,95 surely hurting the client’s case as a result.

92 Id. at 453 & n.3.

93 In addition to violating Rule 8.2, attorneys who make disparaging statements about a judge in reckless disregard
of the truth run the risk of being disciplined for engaging in conduct “prejudicial to the administration of justice” in
(“[F]alse statements or statements made in reckless disregard of the truth that disparage a judge erode the public
confidence in the judiciary and thereby undermine the administration of justice.”); In re Disciplinary Action Against
Nathan, 671 N.W.2d 578, 580 (Minn. 2003) (holding that “baseless and derogatory statements about judges” also
violated Rule 8.4(d)); Office of Disciplinary Counsel v. Surrick, 749 A.2d 441, 445-46 (Pa. 2000) (imposing five-
year suspension against attorney who violated Rule 8.4 by accusing “two judicial officers of violating their oath of
office by rendering decisions in official matters on the basis of outside influence”); see also Anthony v. Va. State
Bar, 621 S.E.2d 121, 127 (Va. 2005) (affirming public reprimand for violating Rule 8.2 and rejecting free-speech
argument by declaring that the statement regarding the judges justifying discipline created “a substantial likelihood
of material prejudice to the administration of justice as a matter of law”).


95 See, e.g., Henry v. Eberhard, 832 S.W.2d 467, 474 (Ark. 1992) (striking six pages of appellants’ brief for
“inflammatory and disrespectful” remarks about trial court); McLemore v. Elliot, 614 S.W.2d 226, 227 (Ark. 1981)
(striking appellant’s brief in its entirety for “intemperate and distasteful language” directed at trial court); Peters v.
A. Limitations on Lawyers’ Speech Rights and the First Amendment

The decision to insert the “knowingly or with reckless disregard as to its truth or falsity” standard in Model Rule 8.2(a) was no accident. The prohibitions in Model Rule 8.2(a) regarding what lawyers can and cannot say about courts and judges obviously have First Amendment implications.96 The fact that a lawyer’s criticism of a court may be in bad taste or reflect poor judgment does not necessarily make the lawyer’s statements unethical. That said, “a lawyer’s speech may be limited more than that of a lay person.”97 Although lawyers do not surrender their right to free speech upon admission to the bar, they must temper their criticisms of courts in accordance with professional standards.98 Still, the drafters of the Model Rules expressly acknowledged the influence of groundbreaking Supreme Court precedent that determined that a lawyer’s speech critical of the judiciary was “speech concerning public affairs” and part of “the essence of self-government.”99 In Garrison v. Louisiana,100 the Supreme Court struck down Louisiana’s criminal libel statute as unconstitutional. In so doing, the Court overturned the

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96 See In re Green, 11 P.3d 1078, 1083-87 (Colo. 2000) (discussing at length the application of the First Amendment to lawyer’s claim that trial judge was racist, and the standard to be applied to lawyer’s conduct); In re Charges of Unprof’l Conduct Involving File No. 17139, 720 N.W.2d 807, 813-15 (Minn. 2006) (discussing First Amendment implications of attorneys’ criticism of judges, appropriate standard to be applied, and Rule 8.2(a)).

97 In re Gershater, 17 P.3d 929, 936 (Kan. 2001); see also In re Zeno, 504 F.3d 64, 66 (1st Cir. 2007) (quoting Gentile v. State Bar of Nev., 501 U.S. 1030, 1071 (1991)); In re Shearin, 765 A.2d 930, 938 (Del. 2000) (“[T]here are ethical obligations imposed upon a Delaware lawyer, which qualify the lawyer’s constitutional right to freedom of speech.”).

98 In re Arnold, 56 P.3d 259, 267-68 (Kan. 2002) (quoting In re Johnson, 729 P.2d 1175 (Kan. 1986)); In re Madison, 282 S.W.3d 350, 353-54 (Mo. 2009) (quoting various sources); In re Slavin, 145 S.W.3d 538, 548-50 (Tenn. 2004) (finding lawyer’s First Amendment defense unavailing and suspending lawyer for statements that an administrative law judge was “[p]etty, barbarous and cruel,” and a “[d]isgrace to his judicial office’’); Anthony, 621 S.E.2d at 126-27. But see In re Green, 11 P.3d at 1083-87 (holding that lawyer’s claim that trial judge was racist and therefore biased against him was speech protected by the First Amendment).

99 Garrison v. La., 379 U.S. 64, 74 (1964); AM. BAR ASS’N, MODEL RULES OF PROF’L CONDUCT R. 8.2 Legal Background 206 (Proposed Final Draft, 1981) (explaining that Model Rule 8.2 is consistent with the limitations imposed by the Supreme Court, namely “that false statements about public officials may be punished only if the speaker acts with knowledge that the statement is ‘false or with reckless disregard’ of its truth or falsity).
conviction of a district attorney for statements made at a press conference, including speculation about the influence of racketeers on the judiciary and an accusation that the large backlog of criminal cases was caused by “the inefficiency, laziness, and excessive vacations” of certain specifically identified judges.101 Citing Garrison, the drafters of the Model Rules explained in the legal background relevant to Model Rule 8.2(a) that “critical factors in constitutional analysis are the statement’s falsity and the individual’s knowledge concerning its falsity at the time of the utterance.”102

Model Rule 8.2(a) might be subject to serious attack on First Amendment grounds if, for example, it were employed to discipline a lawyer for speech about a judicial candidate while campaigning on behalf of a sitting judge during a contested judicial election, it is not as vulnerable when applied to lawyers’ speech as advocates in litigation. The First Amendment generally does not exempt a lawyer from discipline for intemperate speech in court,103 nor from inappropriate statements in pleadings or briefs.104 In most jurisdictions, lawyers’ false statements about courts and judges in such contexts made knowingly or with reckless disregard for the truth simply do not enjoy any significant constitutional protection.105 Further, despite the

101 Id. at 65-67.
103 In re Coe, 903 S.W.2d 916, 917 (Mo. 1995); In re Disciplinary Action Against Garaas, 652 N.W.2d 918, 925 (N.D. 2002).
104 See, e.g., Iowa Supreme Court Bd. of Prof’l Ethics & Conduct v. Ronwin, 557 N.W.2d 515, 517 (Iowa 1997) (imposing discipline for “statements and accusations contained in pleadings and briefs do not infringe upon the attorney’s constitutional right to freedom of speech”); Ky. Bar Ass’n v. Waller, 929 S.W.2d 181, 182-83 (Ky. 1996) (suspension of lawyer who in a pleading opined that a new judge assigned to a case was “much better than that lying incompetent ass-hole it replaced if you graduated from the eighth grade . . .,” and rejecting lawyer’s claim that First Amendment shielded him from discipline); Peters v. Pine Meadow Ranch Home Ass’n, 151 P.3d 962, 967-68 (Utah 2007) (striking briefs and assessing sanction of attorneys’ fees as a result of lawyer’s many inflammatory statements regarding appellate panel, including analogizing its conduct to an alleged slaughter in Haditha of Iraqi civilians).
105 See In re Palmisano, 70 F.3d 483, 487 (7th Cir. 1995); see, e.g., Miss. Bar v. Lumumba, 912 So. 2d 871, 884-86 (Miss. 2005) (finding Rule 8.2(a) violation where lawyer insinuated in court proceedings that judge could be bribed, accused the judge of unfairness, impugned judge’s qualifications, and called the judge a “barbarian” in a press interview).
historical underpinnings of the adoption of this standard in the rule, “recklessness” as used in Model Rule 8.2(a) is measured by the majority of courts using an objective standard, rather than a subjective one.\textsuperscript{106} This remains true where the lawyer is a party and appears pro se.\textsuperscript{107}

\textit{Ramirez v. State Bar of California}\textsuperscript{108} is a prime example of a lawyer finding no solace in the First Amendment as a defense to discipline for attacking the integrity of a court. The lawyer charged with misconduct in that case, Glenn Ramirez, was representing his clients in a case involving the foreclosure of security interests in the clients’ farm property, equipment, and livestock. Ramirez filed a reply brief in the United States Court of Appeals for the Ninth Circuit that asserted that three state court judges who decided a related case involving the same issues had acted “illegally” and “unlawfully” in reversing a trial court judgment for his clients.\textsuperscript{109} He also argued that the judges had “become parties to the theft” of his clients’ property, and that they had entered into an “invidious alliance” with the foreclosing creditor.\textsuperscript{110} In a subsequent petition for certiorari, Ramirez implied that the state court judges had falsified the court record, and further stated that their “‘unblemished’ judicial records were ‘undeserved.’”\textsuperscript{111} The California State Bar charged Ramirez with violating provisions of the state’s Business & Professions Code that prohibited lawyers from falsely maligning judges.

In arguing against discipline, Ramirez contended that his statements were protected by the First Amendment. The California Supreme Court disagreed, concluding that Ramirez’s

\begin{footnotes}
\item[106] Iowa Sup. Ct. Attorney Disciplinary Bd. v. Weaver, 750 N.W.2d 71, 84 (Iowa 2008) (examining statement from standpoint of whether a “reasonable attorney” would have made it and concluding that the respondent attorney “did not have an objectively reasonable basis” for the statement); Bd. of Prof’l Responsibility, Wyo. State Bar v. Davidson, 205 P.3d 1008, 1014 (Wyo. 2009) (determining that “attorney must have had an objectively reasonable basis for making the statements” in question) (citing \textit{In re Cobb}, 838 N.E.2d 1197, 1213 (Mass. 2005)).
\item[107] Notopolous v. Statewide Grievance Comm’n, 890 A.2d 509, 518-20 (Conn. 2006).
\item[108] 619 P.2d 399 (Cal. 1980).
\item[109] \textit{Id}. at 400-01.
\item[110] \textit{Id}. at 401.
\item[111] \textit{Id}. (footnote omitted).
\end{footnotes}
statements were made with reckless disregard for the truth, and thus were not constitutionally-protected. Ramirez also argued that his statements should be excused because they were the product of the “zealous but proper representation of his clients’ interests.” The court rejected this argument as well, noting that Ramirez’s perceived duty of zealous advocacy did not excuse “the breach of his duties as an attorney.” The court ultimately suspended Ramirez from practice for one year. In doing so, it reasoned that Ramirez had to be punished “if for no other reason than the protection of the public and preservation of respect for the courts and the legal profession.”

A number of courts have rejected efforts by attorneys to claim that their challenged statements about a judge were merely statements of opinion that should be constitutionally protected. In In re Disciplinary Action Against Nathan, for example, a lawyer who wrote that the judge whose order he was seeking to have overturned on appeal was “a bad judge” who “won election to the office of judge by appealing to racism” and had “substituted his personal view for the law” was disciplined despite his efforts to claim that such statements were statements of opinion for which he could not be punished. In rejecting the lawyer’s argument,

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112 Id. at 405 (footnote omitted).
113 Id. at 405-06.
114 Id. at 406.
115 In re Disciplinary Action Against Nathan, 671 N.W.2d 578, 581-84 (Minn. 2003); see also In re Palmisano, 70 F.3d 483, 487 (7th Cir. 1996) (explaining that statements like “I think that Judge X is dishonest” implies a factual assertion rather than expressing an opinion); In re Comfort, 159 P.3d 1011, 1025 (Kan. 2007) (explaining that a lawyer cannot avoid discipline merely by characterizing statements as opinions); Pilli v. Va. State Bar, 611 S.E.2d 389, 392 (Va. 2005) (treating a lawyer’s accusation that a judge was lying as a false factual assertion and not merely an opinion).
116 671 N.W.2d 578 (Minn. 2003).
117 Id. at 581-82.
the Minnesota Supreme Court explained that “[m]erely cloaking an assertion of fact as an opinion does not give that assertion constitutional protection.”

Another illustrative case where an appellate advocate was disciplined for attacks on the judiciary after unsuccessfully invoking the First Amendment is Office of Disciplinary Counsel v. Gardner. After losing his client’s case before the Ohio Court of Appeals, Mark Gardner filed a motion for reconsideration that alternatively sought certification to the Ohio Supreme Court. In that motion, Gardner accused the appellate panel that heard the case of being dishonest and ignorant of the law. He declared the panel’s decision “so ‘result driven’ that ‘any fair-minded judge’ would have been ‘ashamed to attach his/her name’ to it.” He added that the court “did not give ‘a damn about how wrong, disingenuous, and biased its opinion [was].’”

Gardner further accused the panel of distorting the truth and of having done so grossly and maliciously. Although that would likely have been more than enough for any author to feel like he had made his point, Gardner went on to write:

Wouldn’t it be nice if this panel had the basic decency and honesty to write and acknowledge these simple unquestionable truths in its opinion? Would writing an opinion that actually reflected the truth be that hard? Must this panel’s desire to achieve a particular result upholding a wrongful conviction of a man who was unquestionably guilty of an uncharged offense—necessarily justify its own corruption of the law and truth? Doesn’t an oath to uphold and follow the law mean anything to this panel?

Is that claim that “We are a nation of laws, not men” have any meaning after reading the panel’s decision? Can’t this panel have the decency to actually address—rather than to ignore—the cases

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118 Id. at 584 (citing Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990)).
120 Id. at 427.
121 Id. (quoting motion).
122 Id. (quoting motion).
123 Id. (quoting motion).
cited by [the client] which demonstrate beyond any doubt that he was convicted of an offense he was never charged with having violated?

In this case, beyond the ignored concepts of the law and truth, lies that of policy. As a policy matter, is this court really encouraging all officers in the Eighth District to charge a generic statute—or Chapter or Title—and not the particular offense they are accusing a citizen of violating? In the name of God, WHY? What is so difficult with a police officer doing his job in an intelligent manner? Why must this panel bend over backwards and ignore well established law just to encourage law officers to be slovenly and careless? In State v. Homan (2000), 89 Ohio St.3d 421 [732 N.E.2d 952], didn’t the Ohio Supreme Court just state that officers actually have to follow the rules strictly? Doesn’t that mean anything to this panel?124

At the time, Ohio ethics rules tracked the Model Code of Professional Conduct. Ohio disciplinary authorities charged Gardner with violating two ethics rules based on the Model Code, including the provision most analogous to Model Rule 8.2, DR 8-102(B).125 That rule provided: “A lawyer shall not knowingly make false accusations against a judge or other adjudicatory officer.”126 Facing suspension for his conduct, Gardner appealed his case to the Ohio Supreme Court, where he argued that his criticism of the court of appeals was protected speech under the First Amendment and the Ohio Constitution. The supreme court disagreed, finding that Gardner’s statements were factual assertions of the lower court’s corruption and bias and not merely “rhetorical hyperbole” or “imaginative expression”; the supreme court also rejected the notion that the statements qualified as protected speech by being “loosely definable” or “variously interpretable” as criticism of the law as applied by the panel.127

124 Id.
125 Id. at 427-28.
127 See Gardner, 793 N.E.2d at 428-30.
The *Gardner* court next addressed DR 8-102(B)’s requirement that a lawyer shall not “knowingly” make accusations against a judge that are false.”128 Gardner had argued that the disciplinary board was required both to prove that his accusations of bias and corruption were false and that he subjectively knew them to be so. Although noting that a few jurisdictions had adopted the subjective standard Gardner urged,129 the Ohio Supreme Court, following the majority approach, applied an objective standard.130 Under an objective standard, attorneys may exercise their rights to free speech and make statements supported by reasonable factual basis even if they turn out to be mistaken. Lawyers may, however, be sanctioned for making accusations of judicial misconduct that a reasonable attorney would believe to be false.131

Importantly, Gardner conceded that he did not inquire into the integrity of the court of appeals panel before attacking it, and that he ignored his partner’s advice not to accuse the panel of bias and corruption.132 Given those facts, the supreme court easily concluded that Gardner had shown a reckless disregard for the truth in his allegations, bolstered also by the fact that it could find no evidence of bias or corruption in its own examination of the appellate record.133 In the end, the court concluded that Gardner had violated the ethics rules and suspended him from practice for six months.134

Some courts, however, approach these questions in a manner that seems to acknowledge the context in which the Model Rule 8.2 standard was created, as well as the fact that judges are public officials (and, in many jurisdictions, elected public officials). The Oklahoma Supreme

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128 *Id.* at 431.
129 *Id.* (citing cases from four states).
130 *Id.* at 432.
131 *Id.*
132 *Id.*
133 *Id.*
134 *Id.* at 433.
Court, for example, acknowledged the inappropriateness of allowing attorney speech critical of judges to be subjected to a different level of scrutiny particularly when lawyers are well-situated to know of which they speak.135 In State ex rel. Oklahoma Bar Ass’n v. Porter,136 the Oklahoma Supreme Court imposed no discipline upon an attorney for his statements to the media after trial that the judge “showed all the signs of being a racist,” that if the judge “wants to practice his racism that way that’s his business,” and that the attorney had “never tried a case before [the judge] that [he] felt [he] got an impartial trial out of him.”137 The Porter court explained that such statements stood “at the epicenter of those expressive activities protected by the First Amendment.”138 The Colorado Supreme Court, analogizing a disciplinary proceeding against a lawyer for criticizing a judge to a public official pursuing a claim for defamation, found that a lawyer’s accusation that a judge was “a racist and bigot” was protected by the First Amendment as a statement of opinion and could not be the basis for discipline under Rule 8.2.139 Likewise, the Ninth Circuit, when confronted with a lawyer who had attacked a judge as being “ignorant, ill-tempered, [a] buffoon, substandard-human, right-wing fanatic, [and] a bully,” concluded that such statements were protected by the First Amendment as statements of opinion and not fact.140

A recent Missouri Supreme Court opinion, Smith v. Pace (In re Smith),141 reflects both an awareness of the important First Amendment issues in play when lawyers engage in speech

135 State ex rel. Okla. Bar Ass’n v. Porter, 766 P.2d 958, 968-69 (Okla. 1988) (“In keeping with the high trust placed in this Court by the people, we cannot shield the judiciary from the critique of that portion of the public most perfectly situated to advance knowledgeable criticism, while at the same time subjecting the balance of government officials to the stringent requirements of New York Times Co. v. Sullivan and its progeny.”).
137 Id. at 960.
138 Id. at 966.
139 In re Green, 11 P.3d 1078, 1082 (Colo. 2000).
140 Standing Comm. v. Yagman, 55 F.3d 1430, 1440 (9th Cir. 1995).
141 313 S.W.3d 124 (Mo. 2010).
critical of courts and the need to examine the lawyer’s conduct with respect to the lawyer’s own knowledge of whether the statements in question were false, or whether the lawyer acted with reckless disregard as to truth or falsity. Interestingly, however, the *Smith* court did so only with respect to imposition of criminal contempt for such speech and explicitly held open the possibility that discipline could still be imposed upon a lawyer without having to undertake such an examination.142

Carl Smith, the lawyer initially convicted of criminal contempt and sentenced to jail for 120 days, had used inflammatory language in two paragraphs of a writ filed with the Missouri Court of Appeals seeking to quash a grand jury subpoena that sought production of documents from his clients.143 Smith petitioned the Missouri Supreme Court for a writ of habeas corpus. The supreme court issued the writ and stayed the remainder of Smith’s jail sentence pending the outcome of the matter. The court then reversed Smith’s conviction because “[t]here simply was no evidence from which the jurors could find the requisite state of Smith’s mind regarding the falsity of the statements, nor were they asked to do so.”144 The specific portions of Smith’s appellate filing that were at issue involved accusations against both a judge and the prosecutor relating to their role in the grand jury proceedings. Smith had alleged “personal interest, bias, and purported criminal conduct” on the part of the judge and prosecutor and further asserted that the judge’s and the prosecutor’s participation “in the convening, overseeing, and handling . . . of this grand jury are, in the least, an appearance of impropriety and, at most, a conspiracy by these officers of the court to threaten, instill fear and imprison innocent persons to cover-up and chill public awareness of their own apparent misconduct using the power of their positions to do

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142 *Id.* at 126 (“The result of this proceeding has no bearing on any disciplinary measures that may result from the attorney’s conduct.”).
143 *Id.*
144 *Id.* at 136.
Smith had additionally decried that the grand jury was “being used by those in power in
the judicial system as a covert tool to threaten, intimidate and silence any opposition to their
personal control—not the laudable common law and statutory purposes for which the grand jury
system was created.” Inflammatory language indeed.

The Missouri Supreme Court acknowledged the First Amendment issues in play even
though the individual whose speech was being questioned was a lawyer, offered a brief survey of
numerous cases examining the question in the disciplinary context, and acknowledged, albeit far
too indirectly, that one of its own earlier decisions explaining the use of an objective standard for
reviewing the lawyer’s statements in a disciplinary proceeding might be subjected to much
higher scrutiny today in light of more recent First Amendment cases such as Republican Party of
Minnesota v. White. Because the matter before it involved criminal contempt charges, the
court in Smith concluded that the conviction could not stand because there was no evidence from
which a jury could find “that the lawyer’s statements were false and that he either knew the
statements were false or that he acted with reckless disregard of whether these statements were
true or false.”

While it may be difficult to justify limiting the analysis in Smith solely to criminal
contempt cases, lawyers must remember that most courts employ an objective standard when
determining whether such speech will justify discipline. Under that objective standard, a lawyer
who impugns the qualifications or integrity of a judge must have an objectively reasonable

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145 Id. at 127.
146 Id.
147 In re Westfall, 808 S.W.2d 829, 937 (Mo. 1991).
149 Smith, 313 S.W.3d at 136.
factual basis for believing the accusations to be true. The prevailing approach sets the bar so high that even reliance upon information provided by clients, anonymous sources, or the media may not provide a sufficient basis for a lawyer to resist a finding that accusations impugning the integrity or qualifications of a court were made with reckless disregard of the truth. In the flowery language of one court, “sincere personal belief will, in the sweet bye and bye, be an absolute defense when we all stand before the pearly gates on that great day of judgment, but it is not a defense” to disciplinary charges brought against a lawyer for falsely accusing a court of misconduct.

Strong arguments can be made that the way the majority of courts have read Model Rule 8.2(a)’s restrictions on attorney speech offends public policy. Presumably lawyers are more knowledgeable than the general public about judges’ qualifications and are better positioned to know when criticism should be leveled against courts. Simultaneously, because ethics rules do not serve in the same manner to chill attorney speech praising judges, the majority interpretation of Model Rule 8.2 further serves to skew the balance of speech about judges heard by the public toward speech lauding the judiciary.

150 In re Disciplinary Action Against Nathan, 671 N.W.2d 578, 584-85 (Minn. 2003) (“The standard used to determine if a statement is false or made with reckless disregard as to its truth or falsity is ‘an objective one dependent on what the reasonable attorney, considered in light of all his professional functions, would do in the same or similar circumstances.”’); Office of Disciplinary Counsel v. Wrona, 908 A.2d 1281 (Pa. 2006) (determining that although subjective belief in truth was sufficient to defeat perjury charge, the lawyer had to have objectively reasonable belief to rebut charge of violation of Rule 8.2).

151 Welsh v. Mounger, 912 So. 2d 823, 828 (Miss. 2005) (finding a newspaper editorial to be an insufficient source); Anthony v. Va. State Bar, 621 S.E.2d 121, 125-26 (Va. 2005) (determining that anonymous letter and telephone calls were not sufficient); Lawyer Disciplinary Bd. v. Turgeon, 557 S.E.2d 235, 242-43 (W. Va. 2000) (concluding that lawyer’s reliance upon client’s word not sufficient to justify accusation of manufacturing evidence against judge).


153 The rule’s scope is, of course, not limited to statements made by attorneys in court or in court papers. A recent, high-profile example of an attorney being disciplined for violating Rule 8.2 for statements made in the media involves a Florida defense attorney who posted statements on his blog calling a judge an “Evil Unfair Witch,” “seemingly mentally ill,” and claimed that the judge was “condescending and ugly” towards him and other attorneys as well. Fla. Bar v. Conway, 996 So. 2d 213, 2008 Fla. LEXIS 2104 (Fla. 2008); Respondent Sean William Conway’s Response to This Court’s Rule to Show Cause Order at 3 (copy on file with authors).
While the public policy issues and the issue of what the First Amendment rights of a lawyer should be are important and intriguing ones when viewed purely from the standpoint of what clients expect from their lawyers—effective advocacy—such questions truly should be nothing more than academic. After all, when the lawyer is acting as an advocate on behalf of a client, the lawyer’s ultimate goal should not be to vindicate her First Amendment rights but to vindicate the client’s position. It is difficult to imagine circumstances in which the client’s interests on appeal are well-served by an advocate’s use of rhetoric that can be justified against an ethical challenge only on First Amendment grounds. Courts rarely respond well to personal attacks on any target, including sister courts. Thus, absent a legitimate factual basis capable of overwhelming proof at the time of making of the allegation, a lawyer should never accuse a judge of bias or prejudice against her client,\textsuperscript{154} allege that a judge is biased against her personally,\textsuperscript{155} charge a judge with corruption or abuse of office,\textsuperscript{156} assert that a judge was bribed,\textsuperscript{157} challenge a judge’s impartiality,\textsuperscript{158} accuse a judge of lying,\textsuperscript{159} allege that a judge is


\textsuperscript{155} See, e.g., In re Crenshaw, 815 N.E.2d 1013, 1014-15 (Ind. 2004) (concluding that lawyer violated Rule 8.2(a) by baselessly accusing judge of being biased against her because of her race and gender, and for falsely reporting that another judge asked her to sit on his lap); In re Eckelman, 144 P.3d 713, 717 (Kan. 2006) (finding Rule 8.2(a) violation, among others).

\textsuperscript{156} See, e.g., Ky. Bar Ass’n v. Prewitt, 4 S.W.2d 142, 143-44 (Ky. 1999) (suspending lawyer for violating Rule 8.2(a)).

\textsuperscript{157} See, e.g., Moseley v. Va. State Bar, 694 S.E.2d 586, 588-90 (Va. 2010) (finding that a lawyer violated Rule 8.2 by stating that an order entered against him by a trial court judge “was ‘an absurd decision from a whacko judge, whom [he] believe[d] was bribed’”) (quoting the lawyer).

\textsuperscript{158} See, e.g., In re Simon, 913 So. 2d 816, 824-27 (La. 2005) (suspending lawyer for six months); State ex rel. Special Counsel for Discipline v. Sivick, 648 N.W.2d 315, 318 (Neb. 2002) (reprimanding lawyer).

\textsuperscript{159} See, e.g., Iowa Sup. Ct. Bd. of Prof’l Ethics & Conduct v. Ronwin, 557 N.W.2d 515, 521-23 (Iowa 1997) (disbarring lawyer).
guilty of criminal conduct,\textsuperscript{160} claim that a judge’s decision is politically-motivated,\textsuperscript{161} suggest that a judge suffers from a mental disability or personality disorder,\textsuperscript{162} accuse a judge of being in cahoots with an adversary to shape the outcome of a case,\textsuperscript{163} assert that a judge could have reached a conclusion or made a determination only through ex parte communication with an adversary,\textsuperscript{164} allege that a judge is incompetent,\textsuperscript{165} accuse a judge of testicular inadequacy,\textsuperscript{166} or suggest that a judge is capable of being unfairly or improperly influenced.\textsuperscript{167} And, though it should go without saying, lawyers cannot escape discipline by phrasing these kinds of accusations against judges in the form of a hypothetical.\textsuperscript{168}


\textsuperscript{161} See, e.g., Idaho State Bar v. Topp, 925 P.2d 1113, 1114-17 (Idaho 1996) (suspending lawyer for violating Rule 8.2(a)).

\textsuperscript{162} See, e.g., \textit{In re Shearin}, 765 A.2d 930, 933, 937-38 (Del. 2000) (finding that lawyer who, among other things, stated that a judge “‘suffered a progressive mental disability’ which caused him to ‘exhibit mood swings and injudicious conduct, including hostility to litigants and court personnel,’” violated Rule 8.2(a)); \textit{Moseley}, 694 S.E.2d at 588-90 (finding that lawyer violated Rule 8.2 by referring to a trial court judge as a “whacko”).

\textsuperscript{163} See, e.g., Lawyer Disciplinary Bd. v. Turgeon, 557 S.E.2d 235, 242-45 (W. Va. 2000) (suspending lawyer for two years for violating Rule 8.2(a)).

\textsuperscript{164} See, e.g., Attorney Grievance Comm’n of Md. v. Hermina, 842 A.2d 762, 771-72 (Md. 2004) (reprimanding lawyer); Bd. of Prof’l Responsibility v. Davidson, 205 P.3d 1008, 1012-17 (Wyo. 2009) (finding that lawyer violated Rule 8.2(a) by making reckless accusations and that he further violated Rule 8.4(d) for the same reason).

\textsuperscript{165} See, e.g., Key Equip. Fin., Inc. v. Hawkins, 985 A.2d 1139, 1146-47 (Me. 2009) (sanctioning lawyer in the amount of $2500).

\textsuperscript{166} See, e.g., \textit{In re Lee}, 977 So. 2d 852, 854-55 (La. 2008) (suspending a lawyer who reacted angrily and euphemistically characterized a trial judge’s lack of courage when the judge indicated that he would recuse himself voluntarily rather than requiring the opposing party to file a motion).

\textsuperscript{167} See, e.g., Prudential Ballard Realty Co. v. Weatherly, 769 So. 2d 1045, 1060, 1067-68 (Ala. 2000) (involving elected state supreme court judges and suggestion by appellate lawyer that judges who depend on campaign contributions were willing to sell “favorable decisions to the highest bidder”); \textit{In re Howard}, 912 S.W.2d 61, 63-64 (Mo. 1995) (suspending lawyer for violating Rule 8.2(a), among others).

\textsuperscript{168} See, e.g., \textit{In re Simon}, 913 So. 2d 816, 825 (La. 2005) (“We would eviscerate Rule 8.2(a) if we were to shield an attorney from discipline for making knowingly false statements about judges simply because he used the artifice of a ‘hypothetical.’”).
B. The Problem of Perception and Courts’ Willingness to Presume the Worst

Cases involving obvious false or reckless attacks on a judge’s integrity or qualifications to hold office are easy to understand and involve conduct that appellate lawyers can easily avoid should they so choose. The more difficult issue faced by appellate lawyers is that courts sometimes appear willing to perceive an ambiguous statement as a disciplinable offense because of its tone rather than adopting an interpretation of the statement as one involving legitimate criticism or mere hyperbole. A troubling example of such a case, even though it both involves extrajudicial statements by a lawyer and was decided prior to the Supreme Court’s landmark ruling in *Gentile v. State*,\(^{169}\) is the imposition of discipline against a prosecutor in *In re Westfall*.\(^{170}\)

After the issuance of an appellate decision holding that the double jeopardy doctrine prohibited his office from prosecuting a defendant, George Westfall, a Missouri prosecutor, criticized the judge by saying that he found the court’s reasons to be “somewhat illogical, and I think even a little bit less than honest” and asserted that the court had “distorted the statute” and used “convoluted logic to arrive at a decision that [the judge] personally likes.”\(^{171}\) In defending the statements in his disciplinary proceeding, Westfall indicated that all that he meant was that “the court of appeals opinion was ‘intellectually dishonest.’”\(^{172}\)

Instead of evaluating Westfall’s actual words, the Missouri Supreme Court, in its opinion imposing discipline, engaged in frequent paraphrasing and restating in its own language what it was Westfall had said. The majority concluded that the imposition of discipline was necessary

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\(^{170}\) 808 S.W.2d 829 (Mo. 1991).

\(^{171}\) *Id.* at 831.

\(^{172}\) *Id.* at 833.
because Westfall had accused the judge “of deliberate dishonesty,” had “purposefully ignore[ed] the law to achieve his personal ends,” and asserted that Westfall’s statement was not to be read as “an implication of carelessness or negligence but of a deliberate, dishonest, conscious design on the part of the judge to serve his own interests.”\textsuperscript{173} The majority’s decision was subject to serious attack in dissent for having employed “at least six unsupportable paraphrases of [Westfall’s] actual words” to support its ruling.\textsuperscript{174}

\textit{In re Wilkins ("Wilkins I")}\textsuperscript{175} is a more recent and more troubling example of a court upbraiding a lawyer more for what it claimed he had written about a lower court than what he actually did write. Wilkins, an Indiana lawyer, represented a Michigan insurance company as its local counsel, working with the insurer’s Michigan counsel in appealing from an adverse verdict. The Indiana Court of Appeals affirmed the trial court’s verdict and award, but Wilkins believed the court of appeals, in so doing, had misstated material facts, and had ignored or misapplied controlling precedent, such that a special procedural rule might permit transfer to the Indiana Supreme Court.\textsuperscript{176}

Wilkins’ Michigan co-counsel prepared a petition for transfer and accompanying draft brief, and forwarded them to Wilkins for review. Wilkins edited the draft provided by Michigan counsel, toning down the tenor of the brief.\textsuperscript{177} He then signed and filed the petition and brief. After being toned down from its original version, the revised brief still contained the following statement:

\begin{footnotesize}
\footnote{173}{\textit{Id.} at 838.}
\footnote{174}{\textit{Id.} at 841 (Blackmar, J., dissenting).}
\footnote{175}{777 N.E.2d 714 (Ind. 2002) (\textit{Wilkins I}).}
\footnote{176}{\textit{Id.} at 715. In Indiana, transfer to the supreme court is available under the rules of appellate procedure when an “opinion or memorandum decision of the Court of Appeals erroneously and materially misstates the record.” \textit{Id.} at 716 (quoting rule).}
\footnote{177}{\textit{Id.} at 715.}
\end{footnotesize}
The Court of Appeals’ published Opinion in this case is quite disturbing. It is replete with misstatements of material facts, it misapplies controlling case law, and it does not even bother to discuss relevant cases that are directly on point. Clearly, such a decision should be reviewed by this Court. Not only does it work an injustice on appellant Michigan Mutual Insurance Company, it establishes dangerous precedent in several areas of the law. This will undoubtedly create additional problems in future cases.178

This passage was footnoted as follows:

Indeed, the opinion is so factually and legally inaccurate that one is left to wonder whether the Court of Appeals was determined to find for Appellee Sports, Inc., and then said whatever was necessary to reach that conclusion (regardless of whether the facts or law supported its decision).179

The Indiana Supreme Court denied the insurer’s petition for transfer and ordered that the supporting brief be stricken as “a ‘scurrilous and intemperate attack on the integrity’” of the lower appellate court.180 Subsequently, Wilkins contacted the Chief Judge of the Indiana Court of Appeals and the Chief Justice of the Indiana Supreme Court to schedule meetings with them to personally apologize for the content of the brief. Before he was able to speak personally with either judge, however, the Indiana Supreme Court Disciplinary Commission instituted proceedings against him. Wilkins then wrote to the Chief Judge and Chief Justice, respectively, “offering to apologize in person and to acknowledge that the footnote was ‘overly-aggressive and inappropriate and never should have made its way into [the] Brief.’”181

Indiana disciplinary authorities charged Wilkins with violating Indiana Rule of Professional Conduct 8.2(a), which, like Model Rule 8.2(a), prohibits a lawyer from making

178 Id. (footnote omitted). Given the standard established by the rule of appellate procedure being relied upon, these assertions would appear required in order to establish jurisdiction.
179 Id. at 716. Although Wilkins did not actually author the quoted text or the footnote, there could be no dispute under Indiana’s disciplinary rules that by signing the brief he became jointly responsible for its content.
181 Id.
statements that he “knows to be false or with reckless disregard as to the truth or falsity concerning the qualifications or integrity of a judge.” In Wilkins’ case, the “judge” was the three-judge panel of the court of appeals from whose opinion his client sought transfer.

In his disciplinary hearing, Wilkins contended that a contract that was cited to the court of appeals in the record, as well as the testimony of two trial witnesses, supported the contention that the court of appeals had misstated the record and the facts. He also cited case law alleged to have been ignored by the court of appeals.

The Indiana Supreme Court determined that the language in the body of the brief to which the footnote was anchored, while “heavy-handed,” roughly paraphrased the bases for transfer expressed in the Indiana Rules of Appellate Procedure. Thus, the court concluded that language provided no grounds for discipline. The comments about the court of appeals in the footnote, however, the court declared to be “not even colorably appropriate.”

The court in Wilkins I began its analysis of the footnote by indicating that Rule 8.2(a) is concerned with preserving public confidence in the administration of justice, referring in the process to one of its earlier decisions in which it had observed that “unwarranted public suggestion” by an attorney that a judge “is motivated by criminal purpose and considerations” weakens and erodes public confidence in the judicial system. The court, finding that Wilkins had no evidence to support his contentions in the footnote, determined that the state’s interest in preserving public confidence in the judicial system and the administration of justice generally far

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182 Id. & n.2.
183 Id. at 716.
184 Id. at 717.
185 Id.
186 Id. (citing In re Garringer, 626 N.E.2d 809, 813 (Ind. 1994)).
outweighed Wilkins’ need to air his unsubstantiated concerns in an inappropriate forum.\textsuperscript{187} Thus, the Indiana Supreme Court determined that the footnote was inappropriate because it suggested that the judges on the court of appeals panel may have been motivated “by something other than the proper administration of justice” in deciding the underlying case.\textsuperscript{188} In fact, the supreme court asserted that the language in the footnote suggested that the judges of the court of appeals were driven to decide as they did by “unethical motivations.”\textsuperscript{189}

Wilkins argued that the statements in the footnote “were merely ‘a critique of the Opinion in a format used throughout the bench, bar and journals.’”\textsuperscript{190} The supreme court faulted Wilkins for not citing authority to support this argument. Beyond that:

Our current rules of appellate procedure dictate the boundaries of acceptable appellate practice. For example, App.R. 46(A)(8)(a) requires that arguments on appeal must be supported by cogent reasoning, citations to authorities, statutes or the record. A statement used in a document filed before the appellate courts that contains an assertion the lawyer knows to be false or made with reckless disregard as to the truth or falsity concerning the qualifications or integrity of a judge is neither a “format” contemplated by our appellate rules nor allowed by our \textit{Rules of Professional Conduct}.\textsuperscript{191}

Having determined that Wilkins violated Rule 8.2(a) by way of the intemperate footnote, the court then discussed what would be the appropriate sanction. The court considered as aggravating factors what can be fairly characterized in the category of lack of remorse. These included Wilkins’ continuing belief that the court of appeals had erred (even though he regretted

\textsuperscript{187} Id. at 718. “Without evidence, such statements should not be made anywhere. With evidence, they should be made to the Judicial Qualifications Commission.” \textit{Id.} at 717.

\textsuperscript{188} \textit{Id.} at 717.

\textsuperscript{189} \textit{Id.}

\textsuperscript{190} \textit{Id.}

\textsuperscript{191} \textit{Id.}
his choice of language in criticizing its opinion) and his decision to defend himself against the charge of misconduct.\textsuperscript{192} As the \textit{Wilkins I} court explained:

\begin{quote}
[T]he hearing officer found that the respondent’s testimony “belied his belief that this disciplinary action stems merely from a poor choice of words.” The respondent’s stated remorse related only to his feelings of personal embarrassment and public humiliation as the result of this Court’s order striking the offending brief. In essence, the respondent averred that, although he might use different language, he believes in the substance of the language contained in the footnote. That he chose to contest this matter through all procedures available under the Admission and Discipline Rules further underscores our conclusion that his remorse only attaches to the fact his statements were not without consequence, notwithstanding his earlier attempts personally to apologize to members of the appellate bench.\textsuperscript{193}
\end{quote}

The \textit{Wilkins I} court concluded that Wilkins had “alleged deliberately unethical conduct on the part of the Court of Appeals.”\textsuperscript{194} Accordingly, and because Wilkins was not sufficiently remorseful, the court suspended him for thirty days.\textsuperscript{195}

\textit{Wilkins I} was a 3-2 decision with a vigorous dissent. For the dissenting justices, the footnote was “tasteless” and “poor advocacy,”\textsuperscript{196} but it should not have provided a basis for discipline. Nothing about the footnote suggested that the court of appeals harbored criminal motives and, for that matter, it was not all that harsh in its criticism. In the dissent’s view:

\begin{quote}
Although footnote 2 certainly is understood to challenge the intellectual integrity of the opinion, I do not believe it suggests any motive other than deciding the case in favor of the party the court determined should prevail. It certainly does not suggest criminal motives. In this respect, it seems to me no different from the attacks many lawyers and nonprofessionals have launched on many court decisions, including such notable ones as \textit{Bush v. Gore}
\end{quote}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{192} \textit{Id.}
\item \textsuperscript{193} \textit{Id.} at 719.
\item \textsuperscript{194} \textit{Id.}
\item \textsuperscript{195} \textit{Id.}
\item \textsuperscript{196} \textit{Id.} at 719-20 (Boehm, J., dissenting).
\end{itemize}
\end{footnotesize}
and Brown v. Board of Education. I cannot see how this footnote differs from the charges occasionally leveled by judges at other judges. For example, Justice Scalia recently contended in Atkins v. Virginia . . . that “[s]eldom has an opinion of this Court rested so obviously upon nothing but the personal views of its members.” See also Webster v. Reproductive Health Servs., 492 U.S. 490, 552, 109 S.Ct. 3040, 106 L.Ed.2d 410 (1989) (Scalia, J., concurring) (stating that assertions by Justice O’Connor were “irrational” and “cannot be taken seriously”).

Finally, the dissent warned that the court should be very cautious in imposing discipline for lawyers’ acts that implicate judicial actions or processes but do not affect clients’ interests. Under the circumstances, and given the supreme court’s unique and often conflicting roles when deciding a lawyer discipline case involving criticism of the judiciary, the dissent considered there to have been no basis to discipline Wilkins.

To be sure, the language with which the court took issue was poor advocacy, but it seems obvious that Wilkins I was wrongly decided. Undoubtedly, the effect of including the allegations in the footnote was to make it much more likely that the court would view the overall affect of the brief as being an attack on the court of appeals than to persuade it to accept transfer. All veteran advocates know that judges often protect their brethren. Wilkins obviously did not go far enough in “toning down” the brief his Michigan co-counsel had drafted. That does not necessarily mean, however, that his decision to spare the red ink when it came time to edit the offending footnote gave rise to a Rule 8.2(a) violation.

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197 Id. at 720 (Boehm, J., dissenting).
198 Id. at 720-21 (Boehm, J., dissenting).
199 See Prudential Ballard Realty Co. v. Weatherly, 769 So. 2d 1045, 1060 (Ala. 2000) (“By couching . . . argument in the form of a written temper tantrum, an attorney can detract from the merits of the argument and do his or her client irreparable harm by failing to maintain the required level of professionalism.”).
Most troubling for appellate lawyers is the supreme court majority’s willingness to equate the footnote with a suggestion that the court of appeals was motivated by a criminal purpose,200 and to state that the footnote effectively accused the court of appeals judges of having “unethical motivations.”201 Reasonable people should be able to agree that the footnote is susceptible to several other, significantly less pernicious interpretations. For example, the language could be read to indicate that the court of appeals might have been determined to find for the appellee because it thought that would be the just result. Perhaps the court of appeals disregarded the facts and law that Wilkins thought compelled a contrary result because it did not agree with Wilkins’ view of their significance. Of course, by framing the issues the way it wanted to treat the footnote as an attack on the court’s integrity, it became significantly easier for the supreme court to find that the statements were made with reckless disregard for their truth or falsity. Although truth would be an absolute defense, it was impossible for Wilkins to prove that the contents of the footnote were true given the gloss added to them by the supreme court. Given that nowhere in the brief had Wilkins actually accused the court of appeals of corrupt or unethical behavior, it would certainly have been surprising if Wilkins had been willing to do so thereafter in trying to defend the charges against him. With the Indiana Supreme Court holding the sole power to characterize Wilkins’ claims, and further serving as both judge and jury, any commentator inclined to cynicism might say that the court deprived Wilkins of the ability to defend himself and then declared that he had not met his burden.

The *Wilkins I* court’s approach to punishing Wilkins also seems harsh under the circumstances. Although Wilkins tried to apologize to the supreme court and to the court of appeals even before being charged with misconduct, and always expressed remorse, the majority

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200 *See Wilkins I*, 777 N.E.2d at 717.

201 *Id.*
of the supreme court determined that was not sufficient. Rather, it appears that the only remorse that would have been sufficient for the court would have been for Wilkins to declare that the court of appeals had properly applied the facts and law and was right after all.202 Worse yet, the court opined that by contesting the charges against him, Wilkins supposedly deserved a sanction harsher than his professional record otherwise warranted.203 That reasoning ought to offend any observer as a gross affront to due process.

It certainly seems ironic that the Indiana Supreme Court majority’s ruling is subject to fair criticism as the act of three judges who appear to have been determined to find an ethics violation and then said whatever was necessary to reach that conclusion, regardless of whether the facts or law supported that decision. To be clear, those who would so criticize the court’s majority know that the judges did not hold as they did because they were somehow corrupt or unethical, because they were spiteful or vindictive, or because they were motivated by anything other than the proper administration of justice. Those critical of the court in Wilkins I would instead stress that the majority lost its way in reaching its decision because it forgot that judges “should hesitate to insulate themselves from the slings and arrows that they insist other public officials face.”204

Apparently stung by immediate public criticism of its decision, the Indiana Supreme Court was presented the opportunity to correct its many missteps when Wilkins sought reconsideration of the application of the First Amendment to the offending language in the brief, as well as reconsideration of the sanction imposed.205 In In re Wilkins (“Wilkins II”),206 the court

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202 See id. at 719 (faulting Wilkins for believing “in the substance of the language contained in the footnote”).
203 Id. (criticizing Wilkins for choosing to contest the charges against him “through all procedures available” under Indiana disciplinary rules).
204 In re Palmisano, 70 F.3d 483, 487 (7th Cir. 1995).
205 In re Wilkins, 782 N.E.2d 985 (Ind. 2003) (Wilkins II).
effectively conceded that it erred in Wilkins I by reducing the sanction imposed without really acknowledging error because it stubbornly adhered to its earlier position that Wilkins violated Rule 8.2(a) by way of the troublesome footnote. Noting that “important interests of judicial administration require considerable latitude regarding the content of assertions in judicial pleadings, motions and briefs,” the court reasoned that these considerations are tempered by Rule 8.2(a).\textsuperscript{207} In this case:

The language of footnote 2 does not merely argue that the Court of Appeals decision is factually or legally inaccurate. Such would be permissible advocacy. The footnote goes further and ascribes bias and favoritism to the judges authoring and concurring in the majority opinion of the Court of Appeals, and it implies that these judges manufactured a false rationale in an attempt to justify their pre-conceived desired outcome. These aspersions transgress the wide latitude given appellate argument, and they clearly impugn the integrity of a judge in violation of . . . Rule 8.2(a).\textsuperscript{208}

The court thus declined to reconsider its holding that Wilkins violated Rule 8.2(a).\textsuperscript{209}

Interestingly, the court again did not discuss alternative interpretations of the footnote. Rather than explaining why its sinister interpretation of the footnote was the correct one, it opted to avoid the issue of interpretation altogether. This it presumably did either because Wilkins’ attorneys did not raise the possibility of benign interpretations in seeking reconsideration or because to discuss alternative interpretations would be too harmful to its conclusion that Rule 8.2(a) had still been violated.

The Wilkins II court did, however, reduce Wilkins’ discipline from a suspension to a public reprimand—a public reprimand it said had already been accomplished by the content of

\textsuperscript{206} Id.
\textsuperscript{207} Id. at 986.
\textsuperscript{208} Id.
\textsuperscript{209} Id.
the Wilkins I opinion. The court based its decision to scold Wilkins rather than suspend him on renewed consideration of his “outstanding and exemplary” professional record and reputation, and on the fact that the offending footnote was actually written not by Wilkins but by his Michigan co-counsel. Of course, none of these items were new developments or newly-discovered information—the court considered these same factors in Wilkins I and nonetheless concluded that Wilkins should be suspended. So then, why did the Wilkins II court reduce Wilkins’ punishment? A likely answer is that by lessening his punishment the supreme court could practically erase the harm caused by its earlier decision without admitting its fundamental error, all the while upholding the perceived honor of the court of appeals.

Although the court in Wilkins II moved in the right direction by reducing Wilkins’ punishment to a public reprimand, it is difficult to agree that it went far enough. In its opinion denying Wilkins’ client’s petition for rehearing, the supreme court could have sternly cautioned Wilkins that the offending footnote could be read to imply unethical behavior by the court of appeals in violation of Rule 8.2(a), and warned him against such irresponsible argument in the future; indeed, courts routinely employ such an approach.

While some lawyers’ criticisms of courts clearly are beyond the pale, cases such as Westfall and Wilkins I raise practical questions for appellate lawyers as to how far a lawyer can

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210 Id. at 987.
211 Id.
212 In re Wilkins, 777 N.E.2d 714, 715, 718-19 (Ind. 2002) (Wilkins I).
213 Of course, at some level the supreme court had already done so. Mich. Mut. Ins. Co. v. Sports, Inc., 706 N.E.2d 555, 555 (Ind. 1999) (“As a scurrilous and intertemperate attack on the integrity of the Court of Appeals, this sentence [in the footnote] is unacceptable, and the Brief in Support of Appellant’s Petition to Transfer is hereby stricken.”).
214 See, e.g., Cathey v. State, 60 P.3d 192, 197 (Alaska Ct. App. 2002) (discussing appellate lawyer’s obligations under Rule 8.2(a) in connection with allegations of misconduct by prosecutor and stating that “[w]e urge [appellate counsel] to carefully consider before making similar unfounded charges in the future”); N. Sec. Ins. Co. v. Mitec Elec., Ltd., 965 A.2d 447, 453 n.3 (Vt. 2008) (noting that the advocate’s briefs characterizing the lower court’s conclusions as “ludicrous” and “inane” lacked “the professional tone the court expected from members of the bar and pointedly reminded readers that the tenor of one’s protestations cannot create error where none exists).
safely go in criticizing a court with whose decision the lawyer and her client disagree. Returning for a moment to *Wilkins I*, it appears that what Wilkins was really trying to do in the brief and the footnote was to suggest that the court of appeals had engaged in result-oriented reasoning. To critique an opinion as being result-oriented was, Wilkins contended, an approach employed “throughout the bench, bar, and journals.” Justice Boehm, coming to Wilkins’ defense in his dissent in *Wilkins I*, contended that the offending footnote was no harsher than the criticism that Justice Scalia has directed at other members of the Supreme Court in published opinions.

Both of these defenses merit further discussion.

With respect to the first, it is true that commentators and scholars criticize decisions as being result-oriented in articles and other media. We have done so in discussing the decision in *Wilkins I*. That does not mean, however, that a lawyer litigating a pending case can similarly chastise the court. Lawyers involved in a pending case operate in a more restrictive environment than do detached lawyers because involved lawyers’ criticisms and mischaracterizations are more likely to disrupt the proceedings or impair the fair administration of justice. In short, comments that might be appropriate in a treatise, or law review or bar journal article, are not necessarily appropriate when made in an appellate brief.

As for the second, judges’ criticism of other judges is not an accurate barometer for determining what amounts to appropriate conduct for a lawyer acting as an advocate. The fact that judges may accuse their brethren of “legalized larceny” does not mean that lawyers can do

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215 *In re Wilkins*, 777 N.E.2d 714 (Ind. 2002) (*Wilkins I*).
216 *Id.* at 718 (quoting Wilkins’ brief in his disciplinary case).
217 *Id.* at 720 (Boehm, J., dissenting).
likewise.\textsuperscript{218} It should come as no surprise that lawyers and judges live and work by different rules. Beyond that, and as the \textit{Wilkins II} court recognized, “occasional retorts to uncivil dialogue” are inappropriate no matter who the speaker may be.\textsuperscript{219}

Further considering the \textit{Wilkins I} and \textit{Wilkins II} decisions, what might Wilkins have written without violating Rule 8.2(a)? Wilkins surely could have written: “Indeed, the opinion is so factually and legally inaccurate that one is left to wonder how the court of appeals could have found as it did.” Alternatively, he might have tried: “Indeed, one is left to wonder how the court of appeals could find for the appellee given the facts in the record and contrary controlling case law.” He could have branded the opinion “incomprehensible” or “incoherent.”\textsuperscript{220} He could have similarly criticized the decision as being “wrongheaded.” Finally, Wilkins might have written: “The court of appeals’ apparent determination to find for appellee Sports, Inc., while perhaps justified by reasoning or logic known to the court, is not supported by the facts in the record or law to which the court should have looked.”

This is not to say that Wilkins should have filed briefs containing any of those alternative characterizations. Those alternatives still exemplify poor advocacy, even if relegated by an appellate lawyer to a footnote. Like the offending footnote, they add no value to the lawyer’s argument, and all run the risk of irritating the court. Even good advocates, however, periodically make mistakes. Pointed criticism of a court’s reasoning or harsh comments about the basis for a court’s decision, even if tactically unwise, should rarely be declared unethical.

\textsuperscript{218} \textit{In re L.A. County Pioneer Soc’y}, 257 P.2d 1, 14 (Cal. 1953) (Carter, J., dissenting on petition for reh’g) (“The record in this case presents one of the most outrageous examples of legalized larceny which has come under my observation.”).

\textsuperscript{219} \textit{In re Wilkins}, 782 N.E.2d 985, 987 (Ind. 2003) (\textit{Wilkins II}).

\textsuperscript{220} \textit{In re Green}, 11 P.3d 1078, 1083 (Colo. 2000) (stating that “if an attorney criticizes a judge’s ruling by saying it was ‘incoherent,’ he may not be sanctioned”).
IV. FRIVOLOUS APPEALS AND OTHER BAD FAITH LITIGATION

“It is the obligation of any lawyer—whether privately retained or publicly appointed—not to clog the courts with frivolous motions or appeals.”\(^{221}\) In this regard, many appellate lawyers would be well advised to heed the colorful advice of one federal court of appeals (itself but a quotation of a Nobel Peace Prize winner) that “[a]bout half the practice of a decent lawyer consists in telling would-be clients that they are damned fools and should stop.”\(^{222}\)

A. Model Rule 3.1 and Similar Restrictions Apply Equally to Appeals

Model Rule 3.1, which establishes lawyers’ duty to advocate only meritorious claims and contentions, applies equally to litigation at all phases or stages. That rule provides, in pertinent part, that “[a] lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law.”\(^{223}\) Although Model Rule 3.1’s use of terms such as “bring” and “assert” perhaps superficially suggests that the rule applies only at the outset of a proceeding in either a trial or appellate court, that is not the case. The Model Rule 3.1 duties are continuous; they exist throughout the life of a case. Thus, a lawyer must be prepared to abandon claims or issues that initially seemed to be valid but which are later determined to be frivolous. Whether a lawyer has a basis for bringing or continuing a proceeding or an issue therein that is not frivolous under Rule 3.1 is generally measured by an objective “reasonable attorney” standard.\(^{224}\) Thus, a lawyer cannot avoid discipline under this

\(^{221}\) Polk County v. Dodson, 454 U.S. 312, 323 (1981).

\(^{222}\) Hill v. Norfolk & W. Ry. Co., 814 F.2d 1192, 1202 (7th Cir. 1987) (quoting 1 Jessup, Elihu Root 133 (1938)).


standard by claiming, for example, to have been mistaken about what was actually settled law.\textsuperscript{225} Nevertheless, as is clearly indicated by the language of the rule itself regarding arguments for “extension, modification, or reversal of existing law,” not every meritless claim or contention is frivolous under this rule.\textsuperscript{226} And, although the use of “good faith” suggests that the lawyer’s efforts at, for example, reversing existing law could be viewed through a subjective lens, the standard used by courts means that determining whether a violation has occurred remains an objective one. For example, a lawyer cannot defend her conduct as involving a good faith attempt to offer a novel argument when a reasonable lawyer, knowing the facts, would conclude that the argument was frivolous.

The impact of this ethical obligation on appellate litigation means that a lawyer cannot undertake a doubtful appeal as a matter of reflex but must ensure through research and analysis of the record that pursuing an appeal would not be a frivolous act.\textsuperscript{227} There are, perhaps, few examples that present a more compelling picture of undertaking a frivolous appeal as a matter of reflex than the appeal pursued by a Wisconsin attorney that resulted not only in an award of appellate sanctions under Federal Rule of Appellate Procedure 38 but ultimately also contributed to the attorney being suspended from the practice of law for two months.\textsuperscript{228}

\textsuperscript{225} Thompson v. Sup. Ct. Comm. on Prof’l Conduct, 252 S.W.3d 125, 128 (Ark. 2007).

\textsuperscript{226} See, e.g., In re Houston, 675 S.E.2d 721, 723 n.1 (S.C. 2009) (finding that meritless racial profiling claim did not violate Rule 3.1).

\textsuperscript{227} See, e.g., Hilmon Co. v. Hyatt Int’l, 899 F.2d 250, 254 (3d Cir. 1990); Hill v. Norfolk & W. Ry. Co., 814 F.2d 1192, 1202 (7th Cir. 1987) (“The filing of an appeal should never be a conditioned reflex.”); In re Zimmerman, 19 P.3d 160, 162 (Kan. 2001) (finding that lawyer’s filing of notice of appeal of summary judgment ruling was Rule 3.1 violation when lawyer had admitted that he had no good faith basis for opposing summary judgment motion filed by opposing party).

\textsuperscript{228} Jiminez v. Madison Area Tech. Coll., 321 F.3d 652 (7th Cir. 2003).
As was explained in *Jiminez v. Madison Area Technical College*,229 William J. Nunnery’s representation of Elvira Jiminez began with a workers compensation claim against her employer, Madison Area Technical College, based on Jiminez’s assertion that college administrators had racially and sexually harassed her, causing her severe emotional distress. To support her claim, Jiminez produced a series of e-mails containing derogatory racial comments about her and discussing the sexual harassment visited upon her.230 In response, the college provided sworn statements from each of the purported authors of the e-mails denying having written them and characterizing them as a “complete fabrication” and a “forgery.” The college asked Nunnery to produce the originals of the e-mails. Nunnery did not do so and, ultimately, Jiminez’s workers compensation claim was denied and she was subsequently fired by the college.231

Jiminez, still represented by Nunnery, sued the college for discrimination in federal court. In a subsequent amended complaint, Nunnery added the purported authors of the e-mails as defendants. After that complaint was dismissed for failure to state a claim, Nunnery filed a second amended complaint that expanded the factual allegations and that specifically referred to the challenged e-mails produced in the unsuccessful workers compensation action.232 Jiminez insisted that the e-mails were authentic even though they were “plastic-laminated”; she had the documents laminated, she said, to “prevent them from being stolen.”233 The attorneys for the college, again, communicated to Nunnery that the individual defendants denied authoring any of

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229 312 F.3d 652 (7th Cir. 2003).
230 *Id.* at 653.
231 *Id.* at 654.
232 *Id.*
233 *In re* Nunnery, 725 N.W.2d 613, 619 (Wis. 2007).
the e-mails that Jiminez was attributing to them. When Nunnery would not drop the claims against the individuals, the college moved for Rule 11 sanctions.\textsuperscript{234}

The district court, after holding an evidentiary hearing, determined that sanctions should be imposed. The district court dismissed Jiminez’s case and ordered Nunnery to pay more than $16,000 to the defendants for what the court described as “truly, and without competition, the most blatant case of a Rule 11 violation [it had ever] seen.”\textsuperscript{235} The district court also found the purported e-mails to be “obviously fraudulent documents” and found incredible Nunnery’s claim that whether the emails were legitimate “was a judgment call” and that he could wait until taking “depositions to test the credibility of the various letters and e-mails.”\textsuperscript{236}

On appeal, the Seventh Circuit not only found that the district court’s ruling was well within its discretion but also concluded that Nunnery’s client had knowingly manufactured the false e-mail evidence to try to support her claim and “exploited the judicial process and subjected her former colleagues and employer to unnecessary embarrassment and mental anguish.”\textsuperscript{237} The Seventh Circuit affirmed the district court’s dismissal of Jiminez’s discrimination claims. The court did not finish there, however, because the college also filed a motion for sanctions for the filing of a frivolous appeal. The Seventh Circuit granted that motion and awarded the college its fees and costs incurred in defending the appeal, in an amount to be determined through further proceedings. In so holding, the Seventh Circuit described the appeal as “a veritable attack on our system of justice.”\textsuperscript{238} The Seventh Circuit’s explanation of why frivolous appeal sanctions were so warranted paints an amazing picture of exactly what Nunnery signed off on in taking the

\textsuperscript{234} Jiminez, 321 F.3d at 654-55.
\textsuperscript{235} Id. at 657.
\textsuperscript{236} Id. at 655.
\textsuperscript{237} Id. at 657.
\textsuperscript{238} Id.
appeal: “The foreordination of Jimenez’s failure on appeal could not have been more obvious. Not only did Jimenez cite to the wrong legal standard in her brief before this [c]ourt, she presented only one page of legal argument in her favor.”239

Courts that determine that an attorney cooperated with a client in a frivolous appeal will not only impose statutory damages and penalties, but will also not hesitate to refer the attorney to disciplinary authorities, as the California Court of Appeals demonstrated in In re Marriage of Gong and Kwong.240 In Gong, the court dismissed Terry Kwong’s frivolous appeal, awarded sanctions of over $20,000, remanded to the trial court for a determination of the appropriate amount of reasonable attorney fees to awarded to Monica Gong for having to defend the appeal, and ordered the attorneys involved to forward a copy of the court’s opinion to the State Bar of California.241

This dispute between former spouses arose after Mr. Kwong failed for several years to make required child support payments pursuant to a marital settlement agreement, a court order was entered to cause payments to be made to Ms. Gong directly from a partnership interest of Mr. Kwong’s, and Mr. Kwong, represented by counsel, moved to halt those payments on the alleged basis that he had already paid $30,000 more than he owed.242 Mr. Kwong’s argument in that regard, however, was based entirely upon an effort to take advantage of the fact that some nine months elapsed between when the amount of the arrearages was determined by the trial court after a hearing and the date that the court’s written order memorializing its ruling was entered. In short, Mr. Kwong, with the assistance of his counsel, argued that the use of the

239 Id. at 658.
241 Id. at 550.
242 Id. at 545.
words “current” and “now” in the written order memorializing the court’s ruling from nine months earlier had the effect of freeing him from any child support obligation during that nine-month period. The court found Mr. Kwong’s appeal to be “meritless and objectively frivolous” and pursued solely for the purpose of delay because the reading urged by Mr. Kwong went “against common sense” such that “no reasonable attorney would so interpret” the order. The court, in addition to the disciplinary referral, offered a few choice words for Mr. Kwong’s lawyers:

An inference of willingness to assist Mr. Kwong’s harassment of Ms. Gong and to abuse the court’s processes could be drawn from his counsels’ sophistry and their litigation tactics, which went beyond proper advocacy and common sense. Mr. Kwong’s attorneys have taken a phrase or two from [the trial court’s] order and fashioned from them an argument that subverts that court’s intent. . . . As a professional, counsel has a professional responsibility not to pursue an appeal that is frivolous or taken for the purposes of delay, just because the client instructs him or her to do so. Under such circumstances, the high ethical and professional standards of a member of the bar and an officer of the court require the attorney to inform the client that the attorney’s professional responsibility precludes him or her from pursuing such an appeal, and to withdraw from the representation of the client.

With respect to Model Rule 3.1, it is also important to note that the rule not only prohibits the pursuit of an appeal altogether where to do so would be frivolous, but additionally prohibits the pursuit of certain issues on appeal even though it would not be unethical to file an appeal as to one or more other issues. Further, and as noted earlier, the rule not only applies to the commencement of an appeal, but applies equally throughout the life of the appellate proceedings. Thus, a lawyer who acted perfectly ethically in originally undertaking an appeal can violate Rule

243 Id. at 546-47.
244 Id. at 548 (citing Zimmerman v. Drexel Burnham Lambert Inc., 252 Cal. Rptr. 1151 (Cal. Ct. App. 1988)).
245 Id. at 549-50 (quoting Cosenza v. Kramer, 200 Cal. Rptr 18 (Cal. Ct. App. 1984)).
3.1 by continuing to pursue an appeal if subsequent events make it apparent that there is no longer a “basis in law and fact for doing so that is not frivolous.”\(^{246}\)

**B. Special Issues in Criminal Appeals**

Because of the constitutional dimensions implicated in criminal proceedings, Model Rule 3.1 acknowledges that its requirements must be applied differently to lawyers defending criminal cases.\(^{247}\) The last sentence of Model Rule 3.1 indicates that a lawyer “for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.”\(^{248}\) As further explained in a comment to Model Rule 3.1, a “lawyer’s obligations under this Rule are subordinate to federal or state constitutional law that entitles a defendant in a criminal matter to the assistance of counsel in presenting a claim or contention that would otherwise be prohibited by this Rule.”\(^{249}\) Nevertheless, the constitutional right to counsel that necessitates greater lenience for criminal defense lawyers under Model Rule 3.1 does not extend to create a right to pursue a frivolous appeal. A lawyer must seek to withdraw from an appellate representation when there are no non-frivolous grounds for appeal.

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246 MODEL RULES OF PROF’L CONDUCT R. 3.1 (2011); see, e.g., Brunswick v. Statewide Grievance Comm., 931 A.2d 319 (Conn. App. Ct. 2007) (finding that a reasonable lawyer would not have continued to pursue a fraud allegation after client was unwilling to furnish an affidavit in support); In re Caranchini, 956 S.W.2d 910, 916-17 (Mo. 1997) (disbarring lawyer who violated Rule 3.1 on multiple occasions by continuing to pursue claims well after it was clear there was no basis for doing so that was not frivolous, including one case in which the lawyer continued to rely on a forged document after its forged nature was clear).

247 See, e.g., Patterson v. N.Y., 432 U.S. 197, 210 (1977) (“[T]he Due Process Clause requires the prosecution to prove beyond a reasonable doubt all of the elements included in the definition of the offense of which the defendant is charged.”); D.C. Bar Legal Ethics Comm., Op. 320 at 2 (May 2003) (“[L]awyers defending a criminal case are authorized to engage in conduct that, in other contexts, might seem inconsistent with the spirit of the Rules.”).


249 Id. cmt. 3.
The procedure for doing so varies significantly between jurisdictions as a result of two Supreme Court opinions. The first, *Anders v. California*,\(^{250}\) outlined a procedure for simultaneously submitting a brief along with a motion to withdraw that references “anything in the record that might arguably support the appeal,”\(^{251}\) a document that unsurprisingly has come to be known as an *Anders* brief. The second, *Smith v. Robbins*,\(^{252}\) indicated that an *Anders* brief is just one of many constitutionally-acceptable ways that courts can permit a lawyer to withdraw in the event of a frivolous appeal, making clear that courts could devise their own rules that would prohibit withdrawal.\(^{253}\)

Consequently, some states have elaborated and expanded upon the requirements for *Anders* briefs. Pennsylvania, for example, recently decreed that a lawyer filing such a brief is required to “(1) provide a summary of the procedural history and facts, with citations to the record; (2) refer to anything in the record that counsel believes arguably supports the appeal; (3) set forth counsel’s conclusion that the appeal is frivolous; and (4) state counsel’s reasons for concluding that the appeal is frivolous.”\(^{254}\) Other states have deviated sharply from the very concept of an *Anders* brief. For example, Indiana prohibits a court-appointed attorney from filing such a brief and seeking to withdraw altogether and, instead, requires the attorney “to submit an ordinary appellate brief the first time—no matter how frivolous counsel regards the

\(^{250}\) 386 U.S. 738 (1967).

\(^{251}\) *Id.* at 744.

\(^{252}\) 528 U.S. 259 (2000).

\(^{253}\) *Id.* at 272-73.

claims to be.” New Jersey has a special court rule applied to petitions for post-conviction relief prohibiting counsel from withdrawing based on a belief that the petition lacks merit.

**C. Statutory Prohibitions and Court Rules Regarding Frivolous Appeals**

In addition to the ethical prohibition under Model Rule 3.1, appellate litigators in civil matters must be aware of a number of statutes and court rules. Many states have statutory law or court rules or both addressing courts’ ability to award damages for the pursuit of frivolous appeals. In federal cases, at least two statutes and one court rule are worthy of note. Federal Rule of Appellate Procedure 38 provides discretionary authority to a court of appeals that determines an appeal to be frivolous to “award just damages and single or double costs to the appellee,” as long as a motion under the rule is separately filed or the court first provides notice and a “reasonable opportunity to respond” before making such an award. The federal statute permitting the imposition of penal sanctions for “multiplying proceedings unreasonably and vexatiously,” 28 U.S.C. § 1927, applies to appellate proceedings just as it does proceedings before the trial court. In addition, 28 U.S.C. § 1912 provides that when a judgment is affirmed on appeal, the court “in its discretion may adjudge to the prevailing party just damages for his delay and single or double costs.” While the word “frivolous” does not appear anywhere in section 1912, it is often used by federal courts in tandem with Rule 38 to render awards against

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256. State v. Rue, 811 A.2d 425, 437 (N.J. 2002) (discussing N.J. SUP. CT. R. 3:22-6 and explaining that denigrating or dismissing the claims of the client or negatively evaluating those claims is contrary to that rule).

257. FED. R. APP. P. 38.


lawyers who prosecute frivolous appeals.\textsuperscript{260} The term “just damages” has been interpreted both in section 1912 and Rule 38 to include the parties’ reasonable attorneys’ fees incurred in responding to the appeal.\textsuperscript{261}

A high-profile example of the confluence of these various federal provisions permitting sanctions, as well as the ability of federal courts to directly impose their own discipline against attorneys, is demonstrated by two related opinions issued by the Ninth Circuit: one in which the court took the highly unusual step of appointing an independent prosecutor to evaluate what sanctions should be imposed against the attorneys involved,\textsuperscript{262} and one that adopted the findings of the independent prosecutor as to sanctions and imposed discipline against the attorneys involved ranging from a six-month suspension to a private reprimand.\textsuperscript{263} Perhaps even more amazingly, these opinions followed the court’s appointment of a district judge as a special master to inquire into the attorneys’ conduct

In \textit{Girardi v. Dow Chemical Co. (In re Girardi)},\textsuperscript{264} four attorneys, including Tom Girardi and Walter Lack, who had collaborated on a number of past matters including what is commonly thought of as the “Erin Brockovich” case, were found to have filed and continued to pursue obviously frivolous litigation causing the defendants significant expense. After obtaining a Nicaraguan judgment against a nonexistent Dole Foods entity, the attorneys filed an action in California seeking to enforce the foreign judgment that attached a document purporting to be issued by the Nicaraguan court but that had been corrected to name the correct legal entity and that, worse yet, was not actually a court document but a notary’s affidavit that described and

\begin{itemize}
  \item \textsuperscript{260} See, \textit{e.g.}, Searcy v. Donelson, 204 F.3d 797, 798 (8th Cir. 2000).
  \item \textsuperscript{261} See, \textit{e.g.}, Lyddon v. Geothermal Props. Inc., 996 F.2d 212, 214-15 (9th Cir. 1993).
  \item \textsuperscript{262} \textit{Girardi v. Dow Chem. Co. (In re Girardi)}, 528 F.3d 1131, 1132 (9th Cir. 2008).
  \item \textsuperscript{263} \textit{Girardi v. Dow Chem. Co. (In re Girardi)}, 611 F.3d 1027 (9th Cir. 2010).
  \item \textsuperscript{264} 611 F.3d 1027 (9th Cir. 2010).
\end{itemize}
translated the foreign writ. The defendants removed the action to federal court and argued the
discrepancy in the documentation. The attorneys for the plaintiffs continued to argue that the
documents they provided were the authentic Nicaraguan court documents and repeatedly made
those same misstatements in a number of filings. They also supported their submissions with at
least one fraudulent affidavit.

The district court dismissed the enforcement action, which it characterized as an
“‘attempt to enforce a $489.4 million judgment against a non-party based on an affidavit that
purports to be a translation of a writ of execution.’” The attorneys who brought the
enforcement action then appealed that ruling. The special master found significant fault with
that decision, describing it as being done without first taking appropriate measures to evaluate
whether the case had any continued viability. The attorneys delegated the drafting of the
appellate brief to a junior associate who had less than two years of experience. The junior
associate continued to describe the affidavit/translation in that brief as the actual writ of
execution. The attorneys then went further and opposed the defendant’s motion to supplement
the record on appeal with the actual writ of execution that they had obtained through discovery in
another matter. At some point thereafter, the junior associate circulated a memorandum to the
other lawyers “expressing his concerns about the viability of their position, noting that the firm
risked exposure to a motion under Federal Rule of Appellate Procedure 38.” Lack and
another one of the target lawyers, Paul Traina, discussed the junior associate’s concerns and
ultimately persuaded him to draft a further reply brief in support of their appeal. The special

265 Id. at 1029-32.
266 Id. at 1056 (quoting the district court).
267 Id. at 1032-33, 1056.
268 Id. at 1033.
269 Id. at 1033, 1058.
master’s recommendation was that the attorneys be required to pay fees and costs of up to $390,000. Instead of acting on the special master’s report itself, the Ninth Circuit appointed a California law professor, Rory Little, as an independent prosecutor to determine what sanctions should be imposed against the lawyers.  

Professor Little’s report filed with the Ninth Circuit in May 2009 concluded that the special master’s findings as to the state of mind of each of the lawyers involved were “‘accurate and provable by clear and convincing evidence,’” and indicated that the lawyers involved did not dispute that they had “‘acted at least recklessly in failing to detect those falsities and permitting them to appear in their opening appellate brief and to stand uncorrected even through the date of oral argument in July 2005.’” The Ninth Circuit after reviewing all the material before it aptly summarized the situation as follows:

[T]he history of the enforcement proceedings includes several crucial moments where a reasonable attorney would have, at a minimum, inquired further about the bona fides of the document that was the basis of the action he was prosecuting. At some point, failing to do so becomes willful blindness.

The Ninth Circuit concluded that each of the attorneys involved deserved discipline for their roles in the pursuit of the frivolous litigation, but distinguished the appropriate discipline to be imposed pursuant to Federal Rule of Appellate Procedure 46 against the various lawyers. As to Girardi, the Ninth Circuit found that although he took “almost no active part in the actual proceedings to enforce the Nicaraguan Judgment,” his practice of permitting lawyers with the Lack firm to sign his name to briefs in this case was reckless conduct and that the “recklessness

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271 In re Girardi, 611 F.3d at 1034.

272 Id. at 1036.
inhere[d] in his mode of practice.\textsuperscript{273} The court opted to formally reprimand Girardi “for his recklessness in determining whether statements or documents central to an action on which his name appears are false.”\textsuperscript{274} Finding that their efforts before the Ninth Circuit to “attempt to salvage their case became indistinguishable from a knowing submission of false documents,” the Ninth Circuit concluded that suspension was an appropriate sanction for Lack and Traina, but limited their suspensions to six months in light of their long and excellent records of successful practice with no prior disciplinary incidents.\textsuperscript{275} As for the junior associate in Lack’s firm, whom the Ninth Circuit never named, it treated his inexperience as a mitigating factor and opted to issue a private reprimand against him “for allowing his superiors to overcome his sound instincts and for his role in drafting briefs that contained false statements.”\textsuperscript{276}

\textbf{V. LAWYERS’ ETHICAL DUTIES TO AVOID DELAY AND EXPEDITE LITIGATION}

Following immediately on the heels of the prohibition against the pursuit of frivolous claims or contentions, Model Rule 3.2, entitled “Expediting Litigation,” requires lawyers to “make reasonable efforts to expedite litigation consistent with the interests of the client.”\textsuperscript{277} Facially, this rule appears to focus solely on when lawyers have to “expedite,” i.e., take actions that would cause litigation to move through the courts more rapidly than it would under ordinary circumstances, but the reference in the comment to Model Rule 3.2 to “dilatory practices” underscores that “expedite” is not truly being used in its traditional, limited sense.\textsuperscript{278} The Model Rule 3.2 duty to make reasonable efforts to expedite litigation encompasses the duty not to

\textsuperscript{273} \textit{Id.} at 1038-39.
\textsuperscript{274} \textit{Id.} at 1039.
\textsuperscript{275} \textit{Id.}
\textsuperscript{276} \textit{Id.}
\textsuperscript{277} \textsc{Model Rules of Prof’l Conduct} R. 3.2 (2011).
\textsuperscript{278} \textit{Id.} cmt. 1 (“Dilatory practices bring the administration of justice into disrepute.”).
engage in improper delay. This ethical obligation applies on appeal just as it does at the trial court level.279 Thus, in addition to the risks discussed above, the attendant delay resulting from pursuit of frivolous appeals or frivolous contentions on appeal can trigger discipline for a Rule 3.2 violation.280

Lawyers’ duty to expedite litigation under Rule 3.2 is often discussed concurrently with the ethical duty to generally be diligent and prompt in handling client matters imposed by Model Rule 1.3.281 There are important differences between the Rule 3.2 and Rule 1.3 duties, however. The most important difference is that Rule 3.2, consistent with the fact that Rule 1.3 already requires lawyers to diligently and promptly represent clients, recognizes clients’ interests as limiting any duty that could be imposed on lawyers to expedite proceedings. An ethics opinion issued by the State Bar of Arizona Ethics Committee provides an example of a circumstance where the client’s interest meant that a lawyer could appropriately cause some delay in the entry of a judgment by not approving the form of the judgment drafted and prepared by the opposing party.282 In Opinion 90-16, the Arizona Committee concluded that a lawyer who was “aware of another pending case in which the ruling on appeal, when rendered, could justify reconsideration or reversal of the court’s decision in this case” could refrain from approving the form of

279 See, e.g., In re Cherry, 715 N.E.2d 382, 385 (Ind. 1999) (imposing 60-day suspension against lawyer who “simply did not get around to filing” petition for post-conviction remedies on client’s behalf for more than five years); In re Vanderbilt, 110 P.3d 419, 422, 425 (Kan. 2005) (suspending county attorney for one year for, among other offenses, violating Rule 3.2 by failing to file briefs in three criminal appeals); In re White, 699 So. 2d 375, 376, 378 (La. 1997) (suspending lawyer from practice for one year and imposing two-year supervised probation period thereafter for failure to file brief despite receiving extension); In re Disciplinary Proceeding Against Lopez, 106 P.3d 221, 223 (Wash. 2005) (handing down 60-day suspension against lawyer for repeated failure to meet deadline for filing opening brief in federal appeal despite receiving multiple extensions).

280 See, e.g., In re Zohdy, 892 So.2d 1277, 1282 (La. 2005) (imposing three-year suspension against attorney for conduct, including pursuit of frivolous appeal, that was effort to delay a class action settlement “in hopes of obtaining an attorney’s fee”).

281 MODEL RULES OF PROF’L CONDUCT R. 1.3 (2011) (“A lawyer shall act with reasonable diligence and promptness in representing a client.”).

judgment proposed by the opposing party without violating Rule 3.2. The reasoning for that conclusion was two-fold. First, the interests of the lawyer’s client in seeking “to avoid having to pay fees to move for a new trial or to appeal until after there is a ruling on the appeal in the other case” appeared to provide sufficient justification for the lawyer to decline approval. Second, the Arizona Committee simply did “not believe that a lawyer commits an ethical violation if he takes advantage of time limits provided for” in the rules and pointed to the fact that Arizona’s Rules of Civil Procedure provided an alternate path that a prevailing party could take to obtain entry of judgment even in face of “inaction” by the opposing counsel.

At least as to the first justification, the Arizona Committee’s analysis is difficult to reconcile with the language in Rule 3.2’s comment explaining that “[r]ealizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client.” The Arizona Committee’s second justification, however, carries significant weight (perhaps enough to override its seemingly flawed first justification) as existence of an alternate procedure delineated by rule for obtaining entry of judgment can fairly be read to mean that the “delay” under consideration was not “otherwise improper.”

Lawyers’ ability to stretch in defending against an alleged Rule 3.2 violation on the basis that delay was in the client’s interests is not limitless. A Fifth Circuit opinion affirming a district court’s disbarment order, for example, readily demonstrates that lawyers who engage in improper efforts, including the filing of a frivolous appeal, “for the purpose of delaying an

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283 Id. at 1.
284 Id. at 1, 2.
285 Id. at 2.
286 Id. at 1; MODEL RULES OF PROF’L CONDUCT R. 3.2 cmt. (2011).
287 MODEL RULES OF PROF’L CONDUCT R. 3.2 cmt. (2011) (“Realizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client.”).
inevitable judgment against their clients” will find no solace in arguing that their clients’ interests were furthered by delay. 288

Appellate deadlines are extremely important, and lawyers who miss a deadline for filing a notice of appeal, or who subsequently miss briefing or other deadlines established by rules or court orders, can visit devastating consequences on their clients. 289 Given the consequences for clients, the liability risks for lawyers in this area are heightened both in terms of exposure to malpractice claims and professional discipline flowing from grievances by motivated former client. A lawyer who is prosecuted by disciplinary authorities over missed deadlines is likely to face charges tied to both Rules 1.3 and 3.2. That is exactly what happened in In re Disciplinary Proceeding Against Lopez. 290

In re Lopez is a remarkable case because, in spite of receiving a remarkable number of reprieves from a federal court demonstrating a seemingly inexhaustible degree of patience with the lawyer’s dilatory behavior, a lawyer seemingly was dead set on getting disciplined. Alfredo Lopez represented Hugo Guzman in federal criminal proceedings that ended in a guilty plea and the imposition of a sentence of 70 months in prison; Guzman, unhappy with that sentence, had Lopez file a notice of appeal on his behalf. 291 Lopez’s initial deadline for filing the opening brief on appeal before the Ninth Circuit was July 29, 1997, which he missed. This resulted in a notice of default from the Ninth Circuit providing fourteen days to correct the failure and file a motion

289 See, e.g., In re Disciplinary Action Against Pierce, 706 N.W.2d 749, 755 (Minn. 2005) (detailing plight of client who was arrested by sheriff for failing to report to prison after appeal had been dismissed when lawyer failed to file a brief, failed to file a motion seeking reinstatement of appeal after dismissal, failed to inform his client that appeal had been dismissed, and failed to respond, or even send to client, prosecutor’s motion seeking order for client to report to prison); Binkley v. Medling, 117 S.W.3d 252, 258-59 (Tenn. 2003) (affirming dismissal of appeal because of failure to timely file notice of appeal).
290 106 P.3d 221 (Wash. 2005).
291 Id. at 223.
for relief from default. Lopez complied and moved for relief and for an extension to file the opening brief by March 20, 1998, explaining that his delay was caused by “an extremely busy trial schedule, both in and out of the State of Washington.”

Though it granted the extension, the Ninth Circuit included a warning in its order that “further requests for extension of time for filing the opening brief are strongly disfavored.”

Nevertheless, this dance continued with Lopez failing to file a brief by the new extended deadline, the Ninth Circuit issuing a default order, and Lopez moving for further extensions of time to file an opening brief based on his busy schedule twice more. Eventually, the Ninth Circuit issued a show cause order on March 10, 2000, raising a possible monetary sanction against Lopez and possible dismissal of the appeal for failure to prosecute. By that time, Guzman had hired new counsel, but no one had bothered to inform the court. Lopez had sent Guzman’s file to the new lawyer and asked the new lawyer to advise the Ninth Circuit of the change in counsel. Guzman’s new lawyer did not do despite having received Lopez’s request well over a year before the show cause order issued.

Lopez never responded to the Show Cause Order, and, on June 28, 2000, the Ninth Circuit entered an order sanctioning Lopez the paltry sum of $500; the Ninth Circuit also sent its sanction order to the Washington State Bar Association (“WSBA”) which led to grievance proceedings against Lopez. The WSBA charged Lopez with several disciplinary violations, including infractions based on his repeated failure to comply with the Ninth Circuit’s deadlines. The Washington Supreme Court ultimately concluded Lopez violated Rule 1.3 and Rule 3.2:

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292 Id. at 224.
293 Id.
294 Id.
295 Id.
296 Id. at 225.
Lopez was nearly six months beyond the first deadline when the Ninth Circuit issued its first default notice. Lopez was nearly four months beyond the second deadline when the Ninth Circuit entered an order of default. He was almost three weeks beyond the third deadline when he transferred Guzman’s file to [replacement counsel].

Based largely on Lopez’s own representations to the Ninth Circuit in his motions for relief as to the reasons for his delay, the court discounted Lopez’s argument in the disciplinary proceedings that he had not violated Rule 1.3 or Rule 3.2 because the scope of his representation of Guzman was limited to filing a notice of appeal. As a result, Lopez was suspended for sixty days.

In addition to missing deadlines, lawyers handling appellate proceedings can violate Rule 1.3, Rule 3.2, or both through delay in handling a matter where there are no true deadlines. This is amply demonstrated by the decision in In re Cherry. Indiana lawyer, Hugh Cherry, was retained in August 1989 by the family of an inmate who had been convicted of a number of criminal offenses. Cherry was engaged to represent the inmate in pursuing post-conviction remedies and was paid a total fee of nearly $4000. Although neither the inmate nor his family instructed Cherry to delay pursuing post-conviction relief for any reason, Cherry did not even meet with his client to discuss post-conviction remedies until March 1995, almost four years after the Indiana Supreme Court had affirmed the convictions. Cherry would not meet with his client again until late in 1996 and did not file a petition seeking post-conviction relief until January 1997. The record before the court reflected that Cherry “had been repeatedly

297 Id. at 227.
298 Id. at 230, 234.
299 715 N.E.2d 382 (Ind. 1999); see also In re White, 699 So.2d at 376, 378 (suspending lawyer from practice for one year and imposing two-year supervised probation period thereafter for failure to file brief despite receiving extension); In re Pierce, 706 N.W.2d at 755 (disbarring lawyer as sanction for variety of ethical violations, including violations of Rule 1.3 and Rule 3.2 for failing to file a brief leading to the dismissal of client’s appeal).
300 In re Cherry, 715 N.E.2d at 383-84.
301 Id. at 384.
informed of [his client’s] desire promptly to prosecute the contemplated [post-conviction remedy] action.”

Finding no “legitimate reason” and “no substantial purpose” for the delay, the court described Cherry’s conduct as merely “not get[ting] around to filing it for five and one-half years . . . while his client’s conviction stood and the client waited, knowing that a possible avenue of legal redress lingered unexplored.” The court held that Cherry’s conduct violated both Rule 1.3 and Rule 3.2, and suspended him from practice for sixty days.

VI. ISSUE OR POSITIONAL CONFLICTS OF INTEREST

More ink has been spilled discussing the relevant ethical analysis when one lawyer or law firm is asked to take adverse positions simultaneously on the same issues in different cases for different clients before different courts then would seem to be justifiable based on how rarely the issues seems to have arisen in the case law. Ethics bodies from a number of jurisdictions have issued a variety of opinions over the years reaching a variety of differing conclusions as to when issue or positional asymmetry is severe enough to pose a conflict of interest.

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302 Id.

303 Id. at 385.

304 Id. at 384-85.


306 See, e.g., State Bar of Ariz. Ethics Comm., Op. 87-15 at 3-4 (July 1987) (opining that even when cases are in same appellate court and same employment law issue is involved in each case, law firm can advocate opposing sides of the issue with client consent); State Bar of Cal., Standing Comm. on Prof’l Responsibility & Conduct, Op. 1989-108 (1989) (opining that even though before the same federal judge, same law firm can take opposing positions on an issue in separate matters); D.C. Bar Legal Ethics Comm., Op. 265 (1996) (finding there to be no reason for distinguishing between trial courts and appellate courts when analyzing ability to take opposing positions); State Bar of Mich., Prof’l Ethics Comm., Op. Cl-1194 (April 1998) (lawyer cannot get consent to conflict, and must withdraw from both representations, where cases are consolidated before highest appellate court and positions are directly opposite); Me. Bd. of Overseers of the Bar, Prof’l Ethics Comm’n, Op. 155 (Jan. 1997) (urging caution as to an attorney seeking to take opposite positions on the same issue before the same judge); State Bar of N.M., Ethics Advisory Opinions Comm., Op. 1990-3 at 2 (1990) (opining that law firm may not take diametrically opposed positions on the same issue in a child neglect case in front of the same court whether trial or appellate level); Ass’n of the Bar of the City of N.Y., Comm. on Prof’l & Judicial Ethics, Op. 1990-4 (May 1990) (addressing only whether taking both plaintiffs’ cases pro bono and defendants’ cases for paying clients before the same human rights commission is appropriate and concluding it was); Philadelphia Bar Ass’n, Prof’l Guidance Comm., Op. 89-27
Yet, the mere fact that there is limited case law on the subject is not necessarily indicative of the likelihood that such a scenario may arise in the real world. Issue or positional conflicts of interest are the kinds of conflicts that are both difficult to capture in even the most sophisticated law firm conflicts systems and, unless raised by the lawyers involved, are often unlikely to be discovered by the clients affected. Further, issue or positional conflicts are often treated, and resolved or avoided in the first place, as “business conflicts” in which a primarily defense-based firm, for example, is unwilling to take a plaintiff’s employment law case for fear of how it may be perceived by the firm’s business clients. Nevertheless, given the nature of this type of conflict of interest, it is most likely to arise, if at all, with respect to lawyers engaged in appellate practice and is worthy of some further discussion.

The ABA’s Standing Committee on Ethics and Professional Responsibility addressed issue conflicts for the first time in 1993. In Formal Opinion 93-377, the Committee examined a scenario in which “a lawyer is asked to advocate a position with respect to a substantive legal issue that is directly contrary to the position being urged by the lawyer (or the lawyer’s firm) on behalf of another client in a different and unrelated pending matter which is being litigated in the same jurisdiction.” The Committee’s ultimate conclusion, looking to language of a comment to then-Model Rule 1.7, was that a lawyer in such a position, if not immediately aware of the problem so as to be able to avoid taking on the second representation, could reasonably conclude that her choice was to either withdraw from one of the two representations or, after disclosing

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(1990) (opining that as to environmental issues, same law firm could take opposing positions on behalf of different clients before same court, whether trial or appellate, but only with consent of both clients).


308 Id. at 1.
fully to both clients the potential impact that obtaining one desired ruling would have on the other, could obtain consent from each client to continue the representations.309

The current version of Model Rule 1.7, which did not exist at the time of Formal Opinion 93-377, dedicates an entire comment to the topic of lawyers taking inconsistent legal positions on behalf of different clients at the same time. The comment acknowledges that the general rule is “that advocating a legal position on behalf of one client might create precedent adverse to the interests of a client represented by the lawyer in an unrelated matter does not create a conflict of interest.”310 But the comment explains that taking inconsistent legal positions can be a Model Rule 1.7(a)(2) “material limitation” conflict of interest in certain circumstances and identifies relevant factors in determining whether a material limitation is sufficient to require advising the clients of the risk and obtaining informed consent.311 Those factors are “where the cases are pending, whether the issue is substantive or procedural, the temporal relationship between the matters, the significance of the issue to the immediate and long-term interests of the clients involved and the clients’ reasonable expectations in retaining the lawyer.”312

The Restatement (Third) of the Law Governing Lawyers313 takes a similar position on the appropriate general rule, highlighting that “if the rule were otherwise law firms would have to

309 Id. at 3, 5. In this regard, the ABA Formal Opinion provides some additional guidance to the lawyer or firm in attempting to determine which representation should be dropped, stating that where it is possible to do so “the lawyer should determine which of the representations would suffer the least harm as a consequence of the lawyer’s withdrawal and then withdraw from that matter.” Id. at 5 n.6.


311 A material limitation conflict occurs where “there is a significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client or a third person or by the personal interest of the lawyer.” Id. R. 1.7(a)(2).

312 Id. R. 1.7 cmt. 24.

specialize in a single side of legal issues.”314 Likewise, the Restatement acknowledges that there can be circumstances in which an issue or positional conflict constituting a material limitation will arise and sets outs an array of factors largely tracking those in the Comment to the Model Rule.315

The most apparent situations in which viable issue conflicts of legitimate concern can arise involve appellate proceedings. Yet, even in that context, opinions as to what sort of controversy crosses the line vary greatly. For example, an Arizona ethics opinion indicates that, provided client consent is obtained, the same law firm can simultaneously advocate opposite sides of the same employment law issue before the same appellate court.316 Yet, a New Mexico ethics opinion concluded that a firm could not take diametrically opposed positions in the same appellate court with respect to child neglect cases.317

There are very few reported opinions dealing directly with issue or positional conflicts. One such opinion involves one of the cleanest and most obviously understood types of issue conflict. In *Williams v. State*,318 the Delaware Supreme Court concluded that a lawyer acted appropriately in seeking to withdraw from one of two death penalty appeals he was handling before that court. The inconsistency in the positions required of that lawyer could not have been more apparent: one case required the lawyer to argue that the trial court should not have given “great weight” to the jury’s 10-2 recommendation in favor of the death penalty; the other case

314 *Id.* § 128 cmt. f.
315 *Id.*
318 805 A.2d 880 (Del. 2002).
required the lawyer to argue that the trial court should have given “great weight” to a jury’s 10-2 vote against the death penalty.319

*Advanced Display Systems, Inc. v. Kent State University*320 presents a scenario at least arguably properly classified as a positional or issue conflict of interest arising in another area where such concerns more frequently appear on lawyers’ radar screens: litigation over intellectual property and, more specifically, patent infringement litigation. *Advanced Display* involved the interplay of two pieces of litigation, the first being a patent infringement action by Advanced against Kent State and a number of related entities. In that case, Advanced, through its counsel, was advancing the position that two of the related Kent State entities were separate, distinct entities.321 While that litigation was pending, however, counsel for Advanced filed his own separate defamation lawsuit against the same two related Kent State entities over statements within a *Texas Lawyer* article about him that had been republished by one of the two Kent State entities at its website. To maintain the suit against both entities, however, the lawyer claimed that one of the entities was the alter ego of the other.322 Based on those inconsistent positions, Kent State moved to disqualify Advanced’s lawyer in the patent infringement litigation, but the motion was denied. As the district court explained, the two positions were not inherently contradictory after all:

> While equity may require application of the alter ego doctrine in one case, it may not in another. Thus, [counsel for Advanced] may permissibly argue that KDI is the alter ego of KDS in his defamation lawsuit without necessarily implying that the separateness of the two corporations should be disregarded for all purposes.323

319 *Id.* at 881.


321 *Id.* at **1-3.

322 *Id.* at **4-5.

323 *Id.* at *6.
While true issue or positional conflicts seem to have been historically rare (if the lack of reported opinions addressing the subject is a fair indication), the modern explosion of access to information combined with lawyers and law firms becoming increasingly specialized in their focus arguably suggest the possibility that issue and positional conflicts of interest will more frequently bubble to the surface in the future. Unfortunately, identifying such conflicts before they are manifest can be an exceedingly difficult task for lawyers and law firms given that such conflicts will often elude automated conflict-checking procedures. Quite simply, these conflicts are rarely apparent from the kinds of information that are universally captured by lawyers and law firms when opening new files and running conflicts, such as names of parties and other key players. Lawyers who specialize in appellate litigation and law firms with separate appellate practice teams may be more likely to identify and address issue or positional conflicts involving competing appeals in advance, as opposed to having them brought to their attention by the clients involved. Fortunately, however, there at least appears to be a clear consensus among those authorities that have addressed this question that this type of material limitation conflict is an inherently consentable one under Model Rule 1.7(a)(2). Thus, in situations where the conflict is brought to the lawyer’s or law firm’s attention in the midst of the competing matters, the lawyer or law firm will at least be free to seek the affected clients’ consent to continued representation.

VI. CONCLUSION

Appellate advocates, like all lawyers, must appreciate their ethical obligations. Zealous advocacy does not excuse lawyers’ ignorance of their professional responsibilities in appellate courts any more than it does in trial courts. Lawyers briefing and arguing appeals must be candid with courts. They must avoid false and misleading statements of fact and law, and must not mislead through silence when they ought to speak. Lawyers’ duty of candor also compels
them to disclose directly adverse authority in the controlling jurisdiction, even if they believe it
to be factually distinguishable or erroneous. Lawyers who plagiarize secondary sources and
even other lawyers’ pleadings or briefs may violate various ethics rules.

Beyond honoring their duty of candor, appellate lawyers are wise to curb their zeal when
criticizing courts. While it is true that a party cannot appeal from a lower court decision without
criticizing it in some form or fashion, advocates must be careful about how far they go in their
criticism. Ethics rules forbid lawyers from knowingly or recklessly making false statements
about judges’ integrity or qualifications. Appellate lawyers must also remain vigilant about their
ethical obligations not to pursue frivolous appeals. The decision to appeal is not one to be made
reflexively but, rather, requires thoughtful consideration and a diligent review of the record to
ensure a ground for appeal that will satisfy the lawyer’s ethical obligations under Rule 3.1, as
well as under relevant state or federal court rules and statutes governing frivolous appeals and
vexatious litigation.

Finally, appellate lawyers must be attentive to potential issue or positional conflicts of
interest. Fortunately, such conflicts are rare and can be cured by client consent.